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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

KNOX COUNTY EDUCATION ASSOCIATION,
Petitioner,
v.
KNOX COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, on the basis of a court's "common sense and experience with life" and "intuitive understanding"—without a job-specific evidentiary showing—public school teaching positions can be classified as inherently "safety sensitive" so as to justify suspicionless drug testing under the Fourth Amendment.

2. If the answer to Question number 1 is "no," whether respondent Knox County Board of Education made the type of evidentiary showing that is necessary to justify suspicionless drug testing of its teachers when there is no evidence in the record to indicate (a) that there is a problem of drug use among the school system's teachers, (b) that any teacher ever has failed to properly perform the duties that allegedly could be affected by drug use, (c) that those duties are of such a nature that undetected drug use would seriously affect a teacher's performance, and (d) that tests based on individualized suspicion would be ineffective in identifying any teacher whose ability to perform the duties in question might be impaired by drug use.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (6th Cir. 1998).

OPINIONS BELOW

The opinion of the Sixth Circuit panel is reported at 158 F.3d 361, and is reproduced in the Appendix to this Petition ("App.") at 1a. The order denying rehearing and rehearing en banc is unreported and is reproduced at App. 83a. Judge Gilman, with whom Chief Judge Martin and Judges Daughtrey and Cole joined, wrote a dissent from the denial of rehearing en banc, which is unreported

and is reproduced at App. 84a. The district court's opinion is unreported and is reproduced at App. 57a.

JURISDICTION

The Court of Appeals entered judgment on June 11, 1998, and denied rehearing and rehearing en banc on February 4, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

A. The Knox County Drug-Testing Policy

Respondent Knox County Board of Education ("Board") operates a public school system comprised of fifty-three elementary schools and thirty-five middle and high schools. The system employs thirty-two hundred teachers. App. 3a. Petitioner Knox County Education Association ("KCEA") represents the professional employees in the school system.

On June 1, 1994, the Board adopted a "Drug-Free Workplace Substance Abuse Policy" ("Knox County Policy," or "Policy"). One part of the Policy, not at issue here, provides that all school employees are subject to being tested upon reasonable suspicion of drug impairment. App. 9a, 10a-13a. The part of the Policy challenged here requires that persons applying for positions designated by the Board as "safety sensitive" must undergo drug testing by urinalysis, after they have been offered a

position but before their employment has commenced, notwithstanding the absence of any suspicion of drug use.[1] This requirement applies both to persons not yet employed by the school system and to current employees who seek to transfer to "safety sensitive" positions (including those who already hold a position designated as "safety sensitive" but who wish to transfer to a different "safety sensitive" position). App. 9a-10a.

The Board has designated a broad range of positions as "safety sensitive," including principals, assistant principals, teachers, teacher aides, substitute teachers, school secretaries and school bus drivers. However, in upholding the suspicionless drug testing program, the court of appeals focused on teachers, and we will do likewise in this petition.

Although the testing procedures in the Knox County Policy are modeled in certain respects on the Department of Transportation's Regulations on Workplace Testing Programs, 49 C.F.R. Part 40, *see* App. 14a, 43a, they depart markedly from the DOT regulations in the range of substances that are screened. The DOT regulations allow testing only for marijuana, cocaine, opiates, amphetamines, and phencyclidine, all of which are classified as Schedule I, II, or III drugs under the Controlled Substances Act, 21 U.S.C. § 812. *See* App. 42a-43a. The Knox County Policy, in contrast, tests for eighteen different drugs, most of which "can be found in common medicines," *id.*, and which are classified in Schedules IV and V because they "have an accepted medical use and a lower potential for abuse." *Id.* The DOT regulations "have specifically rejected allowing employers to test for

[1] The Policy also calls for alcohol testing. Because the court of appeals held that the Board had not justified that part of the Policy, App. 53a-56a, it is not at issue in this petition.

[such] additional drugs," because, *inter alia*, "[t]esting for additional drugs increases the privacy intrusion of testing," and "uniform standards crucial to the accuracy and integrity of the testing process . . . are not now in place for the additional drugs." App. 43a-44a, quoting 49 C.F.R. Part 40.

An applicant who refuses to complete the drug testing procedure, or who tests positive, is not allowed to hold a "safety sensitive" position, with one exception: if it is determined that an individual who tested positive for any of the eighteen covered substances had a lawful prescription for a medication containing the substance, the test is considered negative, and the individual is allowed to hold a "safety sensitive" position, regardless of the possible effects of the medication on the individual's mental or physical capacities. App. 10a, 13a.[2]

B. The Evidence Regarding the Policy's Alleged Relationship to Student Safety

As the court of appeals acknowledged, "there is no empirical or historical evidence of an ongoing [drug] abuse problem [among Knox County's teachers] . . . or evidence of a newly blossoming epidemic of abuse." App. 27a. *See also* App. 17a. Nevertheless, the Board contends that drug testing of teacher applicants is necessary to protect student safety.

To depict the nature and extent of the safety issues allegedly at stake, the Board submitted records for the 1995-96 school year from its Security Department, which,

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[2] However, the substance for which an individual has tested positive is not disclosed to the individual. Consequently, as Section 12 of the Policy expressly acknowledges, the only way an individual who has tested positive can seek to establish that the positive result does not reflect unlawful drug use is to "disclose . . . *all* drugs taken by prescription."

as the court below noted, "reports all incidents, whether criminal or not, that implicate the safety and security of students or staff." App. 5a-6a. Those records showed no incidents of unlawful or violent conduct in any of the fifty-three elementary schools. App. 6a. Of the thirty-five middle and high schools, there were no instances of violent conduct at twenty of them, *id.*; and most instances of non-violent but unlawful conduct that allegedly implicated safety or security likewise occurred at a small number of the schools. *See* Def. Exh. 2(A-B).

The Board did not submit any evidence regarding the role, if any, that teachers are expected to play in dealing with student behavior that may implicate safety or security, other than the fact that teachers are expected to report any violent behavior, drug use, weapons, or other misconduct that they happen to observe. *See* App. 5a, 30a, 37a, 49a.[3] As the court of appeals acknowledged, there is "[no] evidence that the inattentiveness or negligence of a teacher has ever contributed to, or was related in any way, to [any] assaults or to any security incident." App. 6a. "Again, there is no record evidence that a teacher has ever failed to report a student for the use or possession of drugs, alcohol or weapons." *Id.* The Board "has not been able to cite any one specific example in which a teacher or other employee responsible for children has allowed any harm to the children by being in an impaired condition while on the job." App. 38a.

Having failed to present any evidence regarding the duties of teachers that allegedly implicate safety, the Board likewise failed to present any evidence as to how drug use—much less drug use of a nature that would not be discovered through reasonable-suspicion testing—might

[3] However, the chief reporting obligation rests with "a principal or administrator." App. 5a.

render a teacher incapable of performing his or her "safety" functions, whatever they might be. The testimony by the Board's witnesses on that subject was confined to generalizations about the value of a teacher's "be[ing] on [her] toes every minute with every youngster." App. 5a. *See infra* at 16-19.

C. The Decisions Below

KCEA filed suit to enjoin the Knox County Policy as violative of the Fourth Amendment. Noting the absence of any evidence to support a safety need for the Policy's suspicionless drug testing, the district court struck down that part of the Policy. App. 74a-77a.

The Sixth Circuit reversed, declaring that "common sense and experience with life," App. 37a, and the panel's "intuitive[] understanding[ing]," App. 38a, n.23, were sufficient to enable the panel to determine that drug testing of teachers is essential to satisfying a school district's "statutory obligation to insure the safety and welfare of the children." App. 38a.

As to why the Board's *reasonable suspicion* testing program would not adequately serve that asserted interest, the panel opined, without reference to any record evidence, that teachers are not subject to regular scrutiny by "their peers and others," but only by students, "some of whom are very young, who may nor may not be able to detect drug use among teachers," and who, if they did detect such use, "would likely be wary of reporting such conduct." App. 30a-31a.

The panel concluded its analysis by declaring that because teachers are "role models . . ., mentors, friends, and in some cases, parent-figures that stand in the place of absent parents," they "must expect" to be subject to suspicionless drug testing. App. 50a-51a.

The Court of Appeals denied KCEA's petition for rehearing and for rehearing en banc. App. 83a. Four judges dissented from the denial of en banc rehearing, concluding that the panel decision is contrary to this Court's decision in *Chandler v. Miller*, 520 U.S. 305 (1997). The dissenters stated:

> The fact that public schools are heavily regulated in terms of what they can teach and how students and teachers may behave does not justify requiring teachers to sacrifice personal liberties based upon safety considerations that are not relevant to the school environment.
>
> * * * *
>
> The present case is . . . distinguishable from the cases in which the [Supreme] Court has found exceptions to the requirement of individualized suspicion. The policy at issue is not justifiable due to safety concerns, nor due to any claim that teachers should forfeit a normal expectation of privacy. It is, in fact, very similar to the policy struck down in *Chandler*. In that case, as in this one, the officials in question were charged with important responsibilities that affected a great number of people. In that case, as in this one, drug use would interfere with the official's ability to carry out the mission of his or her position. In neither case, however, was there a time-critical safety component of the job that sufficed to override the Fourth Amendment's requirement of particularized suspicion.
>
> What, then, justifies the Board's drug-testing policy? In *Chandler* . . ., the court made the following comment upon the justification for testing candidates for elected office:
>
> > What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to sub-

> mit to drug testing, Georgia displays its commitment to the struggle against drug abuse.
>
> * * * *
>
> [T]he result reached by the panel can only be justified as a political statement that drug use by teachers is unacceptable to the Knox County Board of Education. Although such a statement is laudable, it does not constitute a justification for abridging teaching candidates' freedom from unreasonable searches.
>
> * * * *
>
> The lesson of *Chandler* is that, in the absence of particularized suspicion, an immediate safety concern, or evidence of a higher likelihood of drug abuse among persons with a decreased expectation of privacy, drug testing violates the Fourth Amendment. Because none of these exceptions applies to teaching candidates, *Chandler* requires that the Board's policy be held unconstitutional.

App. 85a-88a.

REASONS FOR GRANTING THE WRIT

In holding that teachers in the Knox County school system occupy positions as to which suspicionless drug testing is justified under the Fourth Amendment, the Sixth Circuit has taken a position that is in conflict with this Court's teachings in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and its progeny—including particularly *Chandler*. Nor is the significance of the Sixth Circuit's decision limited to Knox County. Because the court did not base its decision on record evidence as to the functions actually performed by teachers in the Knox County school system—but relied rather on "common sense and experience with life" and "intuitive understanding"—the decision necessarily stands for the far-reaching proposition that public school teaching positions are in-

herently "safety sensitive," and that it therefore is constitutionally permissible to subject public school teachers in school systems throughout the nation to suspicionless drug testing.

Moreover, insofar as the decision below purports to indicate the type of evidentiary showing that the Government must make in order to justify suspicionless drug testing, it raises a question that has implications for *all* public employers and public employees, and one as to which the Justices of this Court have expressed somewhat divergent views.

The instant case offers this Court an appropriate and timely opportunity to provide guidance with regard to these important questions of Fourth Amendment jurisprudence, and to clarify (1) whether public school teachers categorically are subject to suspicionless drug testing without a job-specific evidentiary showing, and (2) if not, the type of evidentiary showing that must be made by a school system—or, indeed, by any public employer—that seeks to subject its employees to suspicionless drug testing.

1. We start with common ground. Drug tests conducted by public officials through urinalysis constitute searches for purposes of the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). "For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 667 (1995) (O'Connor, J., dissenting). And, in the context of drug testing by public officials, this Court has recognized only a "closely guarded category of constitutionally permissible suspicionless searches." *Chandler*, 520 U.S. at 309.

A suspicionless testing program cannot be sustained unless it strikes a proper balance between governmental

interests and privacy concerns. This Court has explained that "[i]n limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.* at 314, quoting *Skinner*, 489 U.S. at 624. But, absent proof of a "special need . . . sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion," *Chandler*, 520 U.S. at 318, the balance must be drawn against the testing program. "[W]here . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged." *Id.* at 323.[4]

2. This Court's decisions from *Skinner* to *Chandler* make it plain that the "special needs" requirement obligates the government, if it wishes to engage in suspicionless drug testing, to establish that drug use by the persons sought to be tested poses a genuine threat to important governmental interests, and that a program of testing based on individualized suspicion could not adequately protect those interests.

a. In *Skinner*, which concerned regulations of the Federal Railroad Administration ("FRA") that required testing when an employee had been involved in a train accident, it was "undisputed that . . . [the] covered employees are engaged in safety-sensitive tasks." *Skinner*, 489 U.S. at 620. Because a railroad employee's mental and physical condition can affect his ability to perform those tasks, the employees long had been subjected to extensive

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[4] *See also 19 Solid Waste Dept. Mechanics v. City of Albuquerque*, 156 F.3d 1068, 1072 (10th Cir. 1998) ("If the government has not made its special needs showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional").

regulations to insure their health and fitness for duty, including comprehensive periodic physical examinations. *Id.* at 627-28 and n.8.

It likewise was established on the record in *Skinner* that drug and alcohol use posed a grave threat to the safe operation of the nation's railroads. A locomotive "becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." *Id.* at 628. The FRA found that "from 1972 to 1983 'the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor,' and that these accidents 'resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million.'" *Id.* at 607 (quoting FRA findings). *See also Chandler*, 520 U.S. at 314-15 (discussing *Skinner*).

The record in *Skinner* established as well that "[t]esting without a showing of individualized suspicion was essential . . . if [the government's] vital interests were to be served." *Chandler*, 520 U.S. at 315. "Employees subject to the tests discharge[d] duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences. Much like persons who have routine access to dangerous nuclear power facilities . . ., employees who are subject to testing under the FRA regulations can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Skinner*, 489 U.S. at 628. Furthermore, "imposing an individualized suspicion requirement for a drug test in the chaotic aftermath of a train accident would seriously impede an employer's ability to discern the cause of the accident; indeed, waiting until suspect individuals could be identified 'likely would result in the loss or deterioration of the evidence furnished by the tests.'" *Chandler*, 520 U.S. at 315, quoting *Skinner*, 489 U.S. at 631.

b. In *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989), this Court upheld suspicionless drug testing of Customs Service employees "engaged directly in drug interdiction, and . . . those who otherwise are required to carry firearms." *Id.* at 668. This Court emphasized that employees in those positions are exposed to the criminal element and to "vast sources" of illegal drugs. *Id.* at 669. Their work involves both great physical danger and significant exposure to bribery and blackmail. *Id.* at 669-70. Several Customs officers had been killed in the line of duty, and many others had been the targets of bribery by drug smugglers or had been involved in other integrity violations. *Id.* In those unique circumstances, the Court agreed with the Customs Service that the use of drugs by "front-line interdiction personnel," *id.* at 670, and by other personnel whose positions required them to carry firearms, *id.*, posed real and substantial threats to the proper performance of their duties.

As in *Skinner*, this Court approved the suspicionless testing program in *Von Raab* only after making the additional determination that "[i]ndividualized suspicion would not work in this setting." *Chandler*, 520 U.S. at 316 (discussing *Von Raab*). It was "not feasible to subject [Customs] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Von Raab*, 489 U.S. at 674. What is more, to the extent that supervisors could observe Customs agents on the job, reasonable-suspicion testing still would not be sufficient to serve the government's legitimate interests, because on-the-job observation would not reveal whether an employee was using drugs *off* the job; and "the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and black-

mail against which the Government is entitled to guard." *Id.*

Given those unique facts, the Court's narrow opinion in *Von Raab* is "[h]ardly a decision opening broad vistas for suspicionless searches." *Chandler*, 520 U.S. at 321.[5]

c. In *Vernonia School Dist. 47J v. Acton*, this Court upheld suspicionless drug testing of students participating in a school district's athletics program. As this Court observed, searches of students are, as a general matter, subject to a lesser requirement of suspicion than other searches, because of the need for flexibility and informality in student disciplinary matters. *See New Jersey v. T.L.O.*, 469 U.S. 325, 340-43 (1985). Furthermore, students who choose to engage in athletics voluntarily give up much of their privacy, especially with respect to their physical functions. *See Vernonia*, 515 U.S. at 656-57. For these reasons, this Court upheld the testing of student athletes in *Vernonia*, but only after determining (i) that drug use could cause special harm to the student athletes whose health the school district was charged with protecting, *id.* at 662, and (ii) that the district had experienced an "immediate crisis" caused by "a sharp increase in drug use," with student athletes serving as "leaders of the drug culture." *Id.* at 648-49, 663. *See Chandler*, 520 U.S. at 316-17.

This Court further concluded in *Vernonia* that testing based on individualized suspicion would not have been

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[5] Even so, this Court found *Von Raab* to be a close case, and dissents were filed not only by Justices Marshall and Brennan, who had dissented in *Skinner*, but also by Justice Scalia, joined by Justice Stevens, both of whom had voted with the majority in *Skinner*. Justice Scalia opined that the record in *Von Raab* did not contain "real evidence of a real problem that will be solved by urine testing of Customs Service employees." 489 U.S. at 681 (Scalia, J., dissenting). He characterized the majority opinion as resting on "speculation," *id.* at 682, and "symbolism," *id.* at 687.

practicable, because the accusatory nature of such a process would be unacceptable to parents, and would "add[] to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation." *Vernonia*, 515 U.S. at 664.[6]

d. In its subsequent decision in *Chandler*, this Court confirmed what was implicit in *Skinner*, *Von Raab* and *Vernonia*: the category of cases in which suspicionless drug testing is constitutionally permissible is indeed "closely guarded." *Chandler*, 520 U.S. at 309.

This Court held in *Chandler* that Georgia had not established a "special need" to justify testing candidates for high state office. Georgia argued that the use of illegal drugs by public officials "draws into question an official's judgment and integrity; jeopardizes the discharge of public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials." *Id.* at 318. This Court found, however, that "[n]othing in the record hints that the hazards respondents broadly describe are real and not simply hypothetical for Georgia's polity." *Id.* at 319.

This Court further reasoned that because candidates are subject to "day-to-day scrutiny," it was not essential for the state to insist on suspicionless testing. *Id.* at 321. Georgia's desire that its public officers project a drug-free "image" could not justify suspicionless drug testing, this Court explained, because that objective was "symbolic,

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[6] Justice O'Connor, joined by Justices Stevens and Souter, dissented in *Vernonia*. She argued, *inter alia*, that reasonable-suspicion testing would be feasible, *id.* at 674-80 (O'Connor, J. dissenting), and that, whatever might be the case regarding Vernonia's high school, there was insufficient evidence of a drug problem in the *elementary* school. *Id.* at 684-85.

not 'special,' as that term draws meaning from our case law." *Id.* at 321-22. "[A] need of the 'set of good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." *Id.* at 322.

3. The decision of the court below cannot be reconciled with *Chandler.* As the four dissenting judges recognized, *see supra* at 7-8, the Knox County Policy is purely symbolic, and "[n]othing in the record hints that the hazards [the Board and the court below] broadly describe are real and not simply hypothetical for [the Knox County schools]." *Chandler*, 520 U.S. at 319.

a. The *Chandler* Court emphasized that "[a] demonstrated problem of drug abuse, while not in *all* cases necessary to the validity of a testing regime," *id.* (emphasis added), is usually an integral part of any successful effort to "shore up an assertion of special need for a suspicionless general search program." *Id.* It is uncontested that there is no drug problem among Knox County's teachers. *See supra* at 4. Indeed, there is no evidence of any instance "in which a teacher or other employee responsible for children has allowed any harm to the children by being in an impaired condition while on the job," App. 38a, or of any instance in which "the inattentiveness or negligence of a teacher," *whatever* its cause, "has ever contributed to, or was related in any way to," a safety problem in any of the schools. App. 6a. *See supra* at 5.

b. Nor is there any evidence that the duties of Knox County teachers are of such a nature that undetected drug use would be likely to cause the safety problems the Board professes to fear.

The Board and the court below placed great emphasis on the responsibility of teachers to report observed drug use and other misconduct by students. *See* App. 5a, 30a,

37a, 49a. Whether this properly should be considered an integral part of a teacher's job is dubious in the first place. *Compare* App. 30a (declaring that "teachers . . . are perhaps in the best position to determine if a child is . . . involved with drugs"), *with Vernonia*, 515 U.S. at 663-64 (stating that the "function of spotting and bringing to account drug abuse [by students is] a task for which [teachers] are ill prepared, and which is not readily compatible with their vocation").[7] Be that as it may, the record contains nothing to suggest that drug use would render a teacher unable to observe or to report misconduct by students. Any speculation in that regard has no root in the actual experience of the Knox County school system, because "there is no record evidence that a teacher has ever failed to report a student for the use or possession of drugs, alcohol, or weapons."[8] App. 6a.

The other alleged "safety" functions of teachers were not described by the Board in any detail. There is no evidence, for example, as to the role teachers are expected to play if there is a fight between students, or if students are injured in an accident or in some other way. All that the Board offered on these points was a series of conclu-

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[7] *See also* App. 5a (citing testimony that, in the Knox County school system, the primary responsibility for reporting student misbehavior lies with administrators).

[8] The court below suggested that if teachers were "involved in" drugs, they might be unwilling to report student drug use, and "they themselves [might be] open to being compromised and undermined." App. 39a. Such speculation fails to justify suspicionless testing here, just as the testing in *Chandler* was not justified even as to public officials who were responsible for the state's "drug interdiction efforts." 520 U.S. at 311, 318. Whatever role teachers may play in reporting student drug use is hardly comparable to the "unique context," *id.* at 321, of *Von Raab*, where drug interdiction was the employees' primary mission, and where the employees dealt with criminals and had access to vast quantities of narcotics in performing their jobs. *See Chandler*, 520 U.S. at 321.

sory homilies about the value of a teacher's being "on her toes." *See* App. 5a and n.1.

Significantly in this regard, and in sharp contrast to *Skinner*, there is no evidence that the Knox County school system gives teachers any training, or even any instructions, regarding the performance of their supposed "safety" duties, or that the system takes any measures to ensure that teachers are physically fit to perform those duties. For all that appears, drug testing is the *only* measure taken by the Board for the ostensible purpose of ensuring that teachers will be equipped to protect the safety of students.

With no concrete evidence as to any actual safety duties performed by teachers, there obviously was no way for the court below to determine, on the record, that undetected drug use would be likely to render a teacher unable to perform such duties. *See Gonzalez v. Metropolitan Transportation Authority*, —— F.3d ——, 1999 U.S. App. LEXIS 7190, *15-16 (9th Cir. April 14, 1999) (reversing decision upholding suspicionless drug and alcohol testing of bus dispatcher and supervisor of bus driver trainees, because, *inter alia*, the record "does not show exactly what they do, and how being under the influence of alcohol or drugs when they do it might affect safety").

The court below professed to rely instead on what it characterized as "common sense and experience with life," App. 37a, and its "intuitive[] understand[ing]." App. 38a, n.23. Observing that "young children could cause harm to themselves or others while playing at recess, eating lunch in the cafeteria (if, for example, they begin choking) or simply while horsing around with each other," App. 37a, the court concluded, solely on the basis of its "intuitive understanding," that suspicionless drug testing is necessary to prevent such harms. App. 38a, n.23.

That conclusion, however, is "speculation, and not very plausible speculation at that." *Von Raab*, 489 U.S. at 682 (Scalia, J., dissenting). It obviously cannot be assumed, absent any evidence, that a teacher who takes Robitussin A-C cough syrup without a prescription,[9] or who uses some other substance covered by the Knox County Policy, *and whose conduct and demeanor are not such as to give rise to any suspicion of drug use*, will be unable to supervise horseplay or to assist a choking child. If suspicionless drug testing by the government must be based on evidence of "real and not simply hypothetical" dangers, *Chandler*, 520 U.S. at 319, the kind of speculation in which the Sixth Circuit indulged cannot provide a sufficient basis for such testing. *See, e.g., Gonzalez*, 1999 U.S. App. LEXIS 7190 at *16 (refusing to speculate as to safety functions that might be performed by bus dispatcher and how alcohol use might affect the performance of those functions).

c. Even if there were a basis for concluding that undetected drug use by teachers might in some circumstances endanger students, there is no ground for the Sixth Circuit's holding that *suspicionless* testing is necessary to avoid the hypothesized danger. In each of the decisions from *Skinner* through *Chandler*, this Court has recognized that, to sustain suspicionless testing, the government must show that "an important governmental interest . . . would be placed in jeopardy by a requirement of individualized suspicion." *Chandler*, 520 U.S. at 314, quoting *Skinner*, 489 U.S. at 624. *See supra* at 11, 12, 13-15. *See also Vernonia*, 515 U.S. at 674 (O'Connor, J., dissenting) (noting that in *Skinner* and *Von Raab*, this Court "upheld the suspicionless search only after first recognizing the

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[9] That is one of the medications that contains a substance for which the Knox County Policy tests. App. 43a.

Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented").

In apparent deference to this central requirement, the court below asserted that teachers are not subject to regular scrutiny by "their peers and others," but only by students, "some of whom are very young, who may or may not be able to detect drug use among teachers," and who, if they did detect such use, "would likely be wary of reporting such conduct." App. 30a-31a. However, these assertions again are based not on any record evidence, but on unsupportable assumptions and speculation.

Contrary to what the Sixth Circuit seems to have assumed, the position of a public school teacher is not even remotely similar to that of the Customs agents in *Von Raab*, who often worked without being observed by supervisors or others, and whose *off-duty* conduct was both relevant and unobserved. *See supra* at 12-13. Teachers are, as the Sixth Circuit acknowledged, under the constant observation of their students; and there is no basis for the Sixth Circuit's assumption that students will fail to detect and report suspicious behavior by a teacher. Furthermore, teachers constantly are observed in the classroom by their aides, and they frequently are observed in that setting by supervisors and parents. In addition, teachers spend extensive time in hallways, cafeterias, playgrounds, teachers' lounges, and other locations where they regularly interact with other teachers, supervisors and parents. The Sixth Circuit's own example of a child choking on food in the cafeteria, App. 37a, suggests the obvious rejoinder: if a teacher were so impaired by drug use as to be unable to assist such a child, it hardly is likely that the teacher's condition would have gone unnoticed.

d. As the four judges who dissented from the denial of rehearing *en banc* observed, the record in this case is so barren of evidence supporting a safety need for suspicionless testing that the panel opinion can only be seen as a "political statement" against drug use, App. 88a—or, as this Court put it in *Chandler*, a "symbolic" act. 520 U.S. at 322. The panel opinion virtually confesses this point: it dwells at length on the extent to which teachers may influence the perceptions and values of their students, App. 9a, 50a-51a, but makes no effort to explain how that has anything to do with the "safety-sensitivity" that is the supposed reason for the Knox County Policy.[10] Nor did the court below explain how its emphasis on these non-safety considerations can be squared with *Chandler's* admontion that "a need of the 'set a good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." 520 U.S. at 322.

4. In striking down a program under which teachers injured in the course of their employment were required to submit to drug testing, the Fifth Circuit summed up the situation in words that are equally applicable to this case:

> As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities. Failure to do so leaves the effort to justify this testing as responsive to drugs in public schools as a "kind of immolation of privacy and human dignity in symbolic opposition to drug use," that troubled Justice Scalia in *Von Raab*.

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[10] There is no evidence, nor does common sense suggest, that a teacher who uses some drug or medication covered by the Knox County Policy, but whose behavior does not give rise to any suspicion, will be a bad influence on students. In any event, schools have ample means to take action against any teacher who in fact influences students improperly; suspicionless drug testing is neither necessary nor efficacious to that end.

United Teachers v. Orleans Parish School Board, 142 F.3d 853, 857 (5th Cir. 1998), quoting *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting). *See also Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510 N.E.2d 325 (N.Y. App. 1987) (striking down urine tests of teachers being considered for tenure).[11]

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[11] Although the Board's failure to establish a "special need" for suspicionless testing is fatal in itself, *see supra* at 10, the Sixth Circuit's analysis is erroneous in two other important respects as well.

First, that court's conclusion that teachers have a diminished expectation of privacy, App. 45a-51a, misreads *Skinner* and *Vernonia*. Those cases emphasized that the employees (in *Skinner*) or students (in *Vernonia*) who were subject to drug testing were involved in activities that were heavily regulated *as to safety and as to the physical fitness of the individuals in question*, such that those individuals were subject to comprehensive medical examinations and other intrusions into the privacy of their physical functions. *See Skinner*, 489 U.S. at 627-28; *Vernonia*, 515 U.S. at 657. That is not the case here. Nor does the fact that teachers are required to report student misconduct, *see* App. 50a, or that teachers may function as role models, *id.*, afford any basis for concluding that teachers have reduced interests in personal privacy and in shielding their bodies from intrusion, as the court below erroneously concluded.

Second, the Sixth Circuit did not even ask whether the Knox County Policy was likely to accomplish its supposed purpose—a question that is crucial under this Court's precedents. *See Chandler*, 520 U.S. at 319-20; *Skinner*, 489 U.S. at 629-30. Although the Sixth Circuit's reasoning plainly would permit suspicionless testing of incumbent teachers, the Knox County Policy only covers *applicants*, who are tested during the window period between being hired and commencing work. App. 10a. *See also id.* at 51a ("it is a one-time test, with advance notice"). That an applicant, having advance notice, avoids drug use for that limited period says little about whether he or she will continue to abstain from drug use thereafter. As in *Chandler*, this policy is neither "well designed to identify" drug users nor "a credible means to deter [them] from seeking [teaching positions]." 520 U.S. at 319. *See also Gonzalez*, 1999 U.S. App. LEXIS 7190 at *16-20. Furthermore, the fact that

The court below indicated that this case raises "issues of significant import to our schools and communities." App. 2a. There can be no doubt on this score. The specific question whether public school teachers occupy positions that are "safety sensitive" so as to permit suspicionless drug testing is of importance not only to the Knox County school system and its teachers, but to school systems and teachers throughout the nation. In answering this question "yes," the court below has taken a position that is in conflict with this Court's teachings in *Skinner* and its progeny—including particularly *Chandler*. For this reason alone, certiorari is warranted.

But the Sixth Circuit's decison raises a related—and broader—question, and one as to which the Justices of this Court have expressed somewhat divergent views. *See supra* notes 5, 6 (discussing the dissents in *Von Raab* and *Vernonia*). This question concerns the type of evidentiary showing that must be made by the Government in order to justify suspicionless drug testing of employees. The fact that the Sixth Circuit was prepared to rely in this regard on its own "experience" and "intuitive understanding," as opposed to record evidence, indicates a serious misunderstanding of this Court's teaching with regard to this important question of Fourth Amendment jurisprudence. The instant case offers an appropriate and timely opportunity to provide further—and much needed —guidance.

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a teacher with a lawful prescription for a medication containing a covered substance is allowed to hold a "safety-sensitive" position without regard to the medication's possible effects, *see supra* at 4, is further proof that the Knox County Policy is neither aimed at ensuring safety nor designed to accomplish that end.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

Nos. 97-5405, 97-5408

KNOX COUNTY EDUCATION ASSOCIATION,
Plaintiff-Appellee,

v.

KNOX COUNTY BOARD OF EDUCATION,
Defendant-Appellant.

Argued June 11, 1998
Decided Sept. 29, 1998

Before: NELSON and RYAN, Circuit Judges; ROSEN, District Judge.

OPINION

ROSEN, District Judge.*

I. INTRODUCTION

This appeal raises challenging and far-reaching constitutional questions concerning drug testing of teachers and other personnel in our nation's schools. Not only are a number of the issues presented here of first-impression for our Circuit, but these issues call upon us to consider and reconcile important constitutional and societal values concerning the environment in which our children are

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

educated. Because the law in this area is unsettled and the issues of significant import to our schools and communities, the Court examines these important questions in some detal and at some length.

II. BACKGROUND & PROCEDURAL HISTORY

Plaintiff Knox County Education Association ("KCEA"), which represents professional employees in the Knox County School System, initiated this action to challenge drug and alcohol testing procedures adopted by Defendant Knox County Board of Education ("Board"), which is the body responsible for the administration, management, and control of the Knox County School System. In the District Court, KCEA made a facial attack on the Board's "Drug-Free Workplace Substance Abuse Policy," seeking declaratory and injunctive relief. The policy establishes, *inter alia*, two different levels of testing: (1) suspicionless drug testing for all individuals who apply for, transfer to, or are promoted to, "safety sensitive" positions within the Knox County School system, including teaching positions; and (2) "reasonable suspicion" drug and/or alcohol testing of all school employees. KCEA challenged both testing programs as violative of the Fourth Amendment's prohibition against unreasonable searches and seizures.

In response, the Board twice moved for summary judgment on the basis that certain positions in the Knox County School system had already been ruled to be "safety sensitive" as a matter of law in a previous decision rendered in litigation challenging an earlier version of the Policy. See, *Knox County Education Association v. Knox County Board of Education*, No. CIV 3-91-72 (E.D. Tenn. April 13, 1994) ("KCEA I"). Defendant argued, as it argues on appeal, that KCEA I was binding in this matter through the application of the doctrines

of res judicata and collateral estoppel, and that the new Policy, which was carefully drafted to conform with the requirements for constitutional drug testing enunciated in KCEA I, must be found constitutional. United States District Judge James H. Jarvis denied the motions, finding the language in KCEA I regarding safety sensitive positions dictum. The Board moved for summary judgment a third time, and moved that the District Court take judicial notice of the finding in KCEA I. The District Court predictably denied this motion as well.

The matter was tried on November 12, 1996. In an Opinion and Order dated March 4, 1997, the District Court found that the Board's drug testing policy violated the Fourth Amendment to the extent that (1) it permitted any suspicionless drug testing; and (2) in the manner by which it permitted alcohol testing upon reasonable suspicion. The District Court enjoined the Board from further implementation and enforcement of those sections of the Policy, and found the remainder of the policy facially valid.

This matter is now before the Court on the cross-appeals of the parties.

III. FACTS

A. Knox County School System

The Knox County School system is comprised of eighty-eight schools, fifty-three of which are elementary schools and thirty-five of which are middle or high schools. Fifty-three thousand students attend the Knox County Schools, roughly half of whom are elementary school students and half are middle or high school students.

Thirty-two hundred teachers are employed in the Knox County Schools. According to the Director of Personnel

Betty Sparks, a typical day's work for an elementary school teacher revolves around the students in his or her classroom. Elementary school teachers plan for, instruct, and supervise the children in their classroom during the school day. In addition, teachers supervise children coming and going to school, and monitor them in the hallways and cafeteria.

Similarly, the duties of a high school teacher revolve around teaching his or her classes. A high school teacher typically spends six hours of each school day either instructing students or preparing to do so. During the remainder of the school day, high school teachers monitor the hallways when students are changing classes, and may assume other supervisory duties on a volunteer basis.

The Knox County Schools are also staffed by a number of non-teaching professionals who are trained to address the physical and psychological health and safety needs of the students, including nurses, social workers, educational diagnosticians, occupational therapists and physical therapists. To respond to violence or other illegal activity that might occur in or around the schools, Knox County has a Department of School Security comprised of a Chief of Security, four law enforcement investigators, and twenty-four armed, uniformed security officers. One security officer is assigned to each high school, and the remainder of the officers respond to reported incidents at any school.

According to Chief of Security Stephen Griffin, even in those schools where there is a uniformed officer, the majority of information concerning students' behavior comes to the attention of security officers through the observations of the principal or teachers. (J.A. 1122). Griffin testified as follows at trial:

> Q. Mr. Griffin, since you do not have security officers for every school, are teachers and principals

at the schools important to school security? And if so, why?

A. Most definitely. They are the frontline of security as far as the schools are concerned. Even in schools where there is a uniformed officer, the majority of information generated to our office is initiated through a principal or administrator.

(J.A. 937). Furthermore, Director of Personnel Betty Sparks testified that detecting drug use and the possession of a weapon is among teachers' responsibilities. (J.A. 890). Ms. Sparks testified that as a teacher "it is vitally important for [her] to be on [her] toes every minute with every youngster [she] is working with." (J.A. 887).[1]

The Security Department reports all incidents, whether criminal or not, that implicate the safety and security of

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[1] This viewpoint was articulated by other Knox County School administrators as well, including Henrietta Grant, a principal of one of the schools. When asked for the reasons that Knox County needs a drug-free workplace policy in schools that includes teacher testing, Ms. Grant testified:

> I think that my kids are the most important things in our lives, and that we should be as clear-headed as we can be when we're working with those students. I think that we're responsible for them. And I don't feel that the teachers, anybody who works in the school should not be clear-headed and clear-thinking when they're working with them.

(J.A. 953-54). When asked why clear-headedness is important for teachers and principals, she testified:

> Well, for many reasons. Safety: I would not want a person working with a child whose reaction time had been . . . . thrown off with a substance. I think that it's true that you react differently when you're clear-headed as opposed to when you're not clear-headed, and I would hope that all of my teachers would be able to act as quickly and as . . . . they'd be able to act in such a manner that would protect the children if that were called for.

(J.A. 954).

students or staff. The incident reports for 1995-96 school year did not report any unlawful or violent conduct in the fifty-three elementary schools. The records reflect thirty-four assaults on students at the thirty-five middle and high schools, and fourteen assaults on teachers or principals (with no incidents occurring at all in twenty schools). There is no evidence that a pronounced drug/alcohol abuse problem exists among the Knox County teachers [2], nor is there evidence that the inattentiveness or negligence of a teacher has ever contributed to, or was related in any way, to these assaults or to any security incident.

With respect to non-violent but unlawful conduct, the Board's records indicate that during the 1995-96 school year, thirty-five students were charged with the possession of a weapon [3] and seventy-four were charged with the possession or use of alcohol or drugs.[4] Again, there is no record evidence that a teacher has ever failed to report a student for the use or possession of drugs, alcohol, or weapons.[5]

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[2] The Board claims, however, that research indicates that twenty-five percent of the population uses dangerous drugs and that many have used drugs on the job. During the cross-examination of Ms. Sparks at trial, the District Court stated that there was no reason to believe that teachers are different from any other profession.

[3] Twenty-eight weapons were recovered, nineteen of which were knives.

[4] Of these, forty-four of the incidents involved the use of marijuana.

[5] According to the Board, the 1995-96 school year was actually more calm than the preceding three years. In the 1992-93 school year, there were sixty-one assaults by students on students and seventeen assaults on teachers; in the 1993-94 school year, there were sixty-eight assaults by students on students and nine assaults on teachers; in the 1994-95 school year, there were forty-four assaults on students and seven on teachers.

B. Prior Litigation Over the 1991 Drug Testing Policy

In December of 1989, the Board adopted a "Drug-Free Workplace Policy," which was then revised several times over the course of the next two and a half years. In 1991, KCEA filed suit challenging the policy on Fourth Amendment grounds.

In that case, the district court, Judge Jordan presiding, noted that the policy did not describe the methods or procedures to be followed in obtaining or testing urine samples, nor did it assure the employee applicants that their privacy interests in the results would be protected. This led the court to conclude: "Because the privacy interests of the professional employee applicants in this case are not protected at all by the policy as it is written, the court finds that for this reason alone the policy must fail constitutional examination." (J.A. 282).

The court did not end its inquiry at that point, however. The court addressed the second part of the balancing test to examine whether the governmental interests were strong enough to test all professional employees, irrespective of the nexus their position had to the safety of the children. The court then found that of the professional employee positions subject to pre-employment drug screening, principals (and assistant principals), teachers (and traveling teachers), teacher aids, and school secretaries occupied safety sensitive positions because "[a]ny lapse in attention or judgment on the part of these employees could result in an immediate threat to a child's safety." (J.A. 284-85). This led the court to conclude:

> Thus, even if the policy adequately protected the privacy interests of the professional employees, and the court finds that it does not, the only professional employees which the court considers subject to pre-employment testing are principals, assistant princi-

pals, teachers, traveling teachers, teacher aids, and school secretaries.

(J.A. 287). In the instant litigation, a crucial issue is whether teachers are "safety sensitive" employees—a question which the Board claims has already been resolved by KCEA I.

C. 1994 Drug Testing Policy

On June 1, 1994, in response to Judge Jordan's decision, the Board of Education met in regular session and voted to adopt the "Drug-Free Workplace Substance Abuse Policy" for implementation in the Knox County School system. As adopted, the Policy establishes a comprehensive drug and alcohol testing program for the Board of Education's employees. The Policy notes that the Federal Anti-Drug Act, 41 U.S.C. § 702, requires federal grant recipients, such as the Board, to establish a drug-free workplace. The Policy describes its goals and objectives as follows:

1. To establish, promote, and maintain a safe, healthy, working and learning environment for employees and students.
2. To aid the affected employee in locating a rehabilitation program for employees with self-admitted or detected substance abuse problem.
3. To promote the reputation of the Knox County School System and its employees as responsible citizens of public trust and employment.
4. To eliminate substance abuse problems in the workplace.
5. To aid in the reduction of absenteeism, tardiness, and apathetic job performance.

6. To provide a clear standard of job performance for Knox County Schools employees.

7. To provide a consistent model of substance-free behavior for students.

(1994 Policy, J.A. 1006-1007).[6]

The Policy divides the tested employees into two distinct groups: (1) those who may be the subject of suspicionless testing (those who may be tested pre-employment for "safety sensitive" positions, pre-transfer for "safety sensitive" positions, and upon return to duty after undergoing rehabilitation); and (2) those who may be tested for reasonable suspicion of drug or alcohol impairment while at work (all employees).

The substance abuse policy prohibits any Board of Education employee from being under the influence of an illegal drug or alcohol while on duty, on Knox County Board of Education property, or in attendance at a System-approved or school-related function.

1. Suspicionless Testing

The Policy allows suspicionless testing for people applying for positions that are "safety sensitive." The Policy defines "safety sensitive" positions as those positions "where a single mistake by such employee can create an immediate threat of serious harm to students and fellow employees." (J.A. 1007). According to the Policy, and consistent with the ruling in KCEA I, this categroy in-

[6] Despite the multifaceted aims of the Policy, the District Court found that "it is clear from the trial of this case that the primary policy consideration the Board of Education is concerned with is the safety of the students entrusted to it; that is, that a student might be injured because of the inattentiveness or negligence of a drug or alcohol impaired teacher or other employ having responsibility for the students." (J.A. 39).

cludes principals, assistant principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries and school bus drivers.

Applicants for these positions are tested after they are offered a job but before their employment has commenced (i.e., post-offer, pre-employment). They are to be given a copy of the Policy in advance of the physical and are to sign an acknowledgment prior to substance screening, permitting the summary result to be transmitted to the Medical Review Officer ("MRO") and Director of Personnel. An applicant refusing to complete any part of the drug testing procedure will not be considered a valid candidate for employment with the school system, and such refusal will be considered as a withdrawal of the individual's application for employment. If substance screening shows a confirmed positive result for which there is no current physician's prescription, a second confirming test may be requested by the MRO. If the first or any requested second confirming test is positive, any job offer will be revoked.

Curent employees attempting to transfer into safety sensitive positions—including those who already hold such positions—are also tested. Employees who test positive for illegal drugs on a promotion/transfer test will no longer be considered an applicant for that position. Employees seeking a transfer or promotion who refuse any portion of the drug testing procedure forfeit the opportunity to transfer to, or advance into, a safety sensitive position and are subject to discipline for insubordination (including termination).

2. Reasonable Suspicion Testing

Section .05 of the Policy provides for drug and/or alcohol screening based upon reasonable suspicion as follows:

> Whenever the Knox County Board of Education, through its Director of Personnel or the person authorized to act as the Director in the Director's absence, and/or the Medical Review Officer, reasonably suspects that an employee's work performance or on-the-job behavior may have been affected in any way by illegal drugs or alcohol, or that an employee has otherwise violated the Knox County Board of Education Drug-Free Workplace Substance Abuse Policy, the employee may be required to submit a breath and/or urine sample for drug and alcohol testing. When a supervisor observes or is notified of behavior or events that lead the supervisor to believe that the employee is in violation of the Drug-Free Workplace Substance Abuse Policy, the Supervisor should notify the Director of Personnel.
>
> An employee who is required to submit to drug/alcohol testing based upon such reasonable suspicion and refuses will be charged with insubordination and [subject to the disciplinary sanctions, including possible termination].

(J.A. 1010).

Further, an employee testing positive on a reasonable suspicion test will be found to be in violation of the Policy, and such a violation will constitute grounds for termination. The Policy notes that the School System Director of Personnel, or the person authorized to act in that person's absence, or the MRO are the only individuals in the Knox County School System authorized to make a determination that reasonable suspicion, or cause, exists to order a drug screen, and are the only individuals in the School System who may order an employee to submit to a drug screen.

The Policy describes two types of cases for which the reasonable suspicion procedures may be invoked:

> (1) Chronic case
>
> Deteriorating job performance or changes in personal traits characteristics where the use of alcohol or drugs may be reasonably suspected as the cause. These cases may develop over a fairly long period of time.
>
> (2) Acute case
>
> Appearing in a specific incident or observation to then be under the present influence of alcohol and/or drugs is reasonably suspected to be a contributing cause. Regardless of previous history, immediate action is necessary.

(J.A. 1011).

The Policy further enumerates the circumstances under which substance screening may be considered, which include, but are not limited to, the following:

1. Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.
2. Apparent physical state of impairment of motor functions.
3. Marked changes in personal behavior not attributable to other factors.
4. Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected or employee involvement in a pattern of repetitive accidents, whether or not they involve actual or potential injury.

5. Violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs and/or violations of drug statutes.

(J.A. 1011). The above circumstances under which substance screening may be considered "are strictly limited in time and place to employee conduct on duty or during work hours, or on or in Knox County Board of Education property, or at school system-approved or school related functions." (J.A. 1011).

3. Testing Procedures

Section.11 of the Policy describes the drug and alcohol abuse testing procedures. The Board has designated a physician as the MRO. The MRO is responsible for reviewing the results of drug tests before they are reported to the Board's Director of Personnel; reviewing and interpreting each confirmed positive test to determine if there is an alternative medical explanation for the positive result; conducting an interview with the individual testing positive; reviewing the individual's medical history and medical records to determine if the positive result was caused by legally prescribed medication; requiring retest of the original specimen if the MRO deems it necessary; and verifying that the laboratory report and the specimen are correct. The MRO is expected to follow the Medical Review Officer's Manual published by the U.S. Department of Health and Human Services. However, if the MRO determines that there is a legitimate medical explanation for the positive test other than the use of a prohibited drug, the MRO will conclude that the test is negative and take no further action. If the MRO concludes that a particular test is scientifically insufficient, the MRO will conclude that the test is negative for that individual. If the MRO determines that there is no legiti-

mate explanation for the positive test other than the use of a prohibited drug, the MRO will communicate the test results as positive to the Director of Personnel.

In the case of drug testing, urine specimens are to be collected in accordance with Department of Transportation Workplace Testing Programs, 49 C.F.R. part 40, with some exceptions. Procedures for collecting urine specimens shall allow privacy unless there is reason to believe that a particular individual may alter or substitute the specimen.[7] The initial test performed on the urine at the laboratory will be an Enzyme-Multiplied Immunoassay Technique (EMIT) screen which will be used to eliminate negative urine specimens from further consideration. All specimens identified as positive on the initial test will then be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques.

With respect to the alcohol testing procedures, the Policy provides only that the Knox County Sheriff's Department will be requested to perform, and will be responsible for administering, a breath analysis test.[8] If the breath analysis test is positive, a second breath analysis may be taken. The breath analysis test level to be considered positive will be .02. The alcohol urinalysis will be an EMIT screen followed by confirmatory gas chromatography tests on positive screens. Either test will be considered positive if the results are .04 or more. In contrast to the D.O.T. procedures—which contain detailed regula-

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[7] Unlike the D.O.T. testing procedures, the Knox County Policy specifies four examples in which reasonable cause exists, but the list is only illustrative. Under the D.O.T. procedures, direct observation is only permissible in one of four specifically delineated circumstances.

[8] At trial, however, the Director of Personnel testified that the breathalyzer test is now administered by commissioned law enforcement officers in the School Security Department.

tions concerning training for indivduals who administer breathalyzers, standards for breathalyzer machines, and standards for administering the initial test—the Policy provides few guidelines regarding the administration of a breathalyzer test.

Procedurally, the Policy describes the reasonable suspicion testing as follows:

> Once the determination has been made that an employee is to be tested based upon reasonable suspicion, the Director of Personnel should then transport the employee to the collection site, or make other appropriate arrangements for transportation. The collection site personnel should be notified that the reason for testing is reasonable suspicion.
>
> Upon arriving at the collection site, the employee will be asked to sign a release for testing and to assist in completing the necessary forms for testing. After the employee has signed the necessary releases for testing, then the standard procedures for drug and alcohol testing should be followed by the collection site personnel.
>
> Once the procedure has been completed, the employee should be transported back to the Director of Personnel's office where the employee will be placed on administrative leave with pay until the results of the tests are available and given instruction to call the Director of Personnel each work day, before the normal reporting time for that employee, for further instructions.
>
> If the employee refuses to sign the release or refuses to be tested by NPL, the employe should be advised that refusal under the Board Policy is insubordination. If the employee continues to refuse,

> the employee should be transported back to the Director of Personnel's office. The Director of Personnel will place the employee on administrative leave with pay with instructions to call his/her office before the normal reporting time for that employee on the following work day.
>
> If Director of Personnel feels that the employee is in no condition to operate a vehicle, then the employee should be transported home. * * *
>
> In the event of positive test results, the MRO will contact the Director of Personnel who will then review other records of the employee and contact the Knox County Law Director to work out proper disciplinary procedures, * * *.

(J.A. 46).

The Policy recognizes that information regarding an individual's drug testing results is confidential and "will be released by the MRO and the Director of Personnel only upon the written consent of the individual, except the results may be released and relied upon by the Knox County Board of Education in any administrative or court action by the employee involving the drug test, or any discipline resulting from a violation of this policy, including employment and court proceedings." (J.A. 1016-17). The Policy further provides that the substance screens will be maintained by the MRO in a secure fashion and disclosed to the Director of Personnel only to the extent necessary to address any work-related safety risks occacasioned by either the drug or alcohol use. All personnel records and information regarding referral, evaluation, substance screen results, and treatment are to be maintained in a confidential manner and no entries concerning such will be placed in the employee's personnel file. In

effect, two separate files will be maintained: one with the MRO indicating the results of the substance abuse tests and another maintained as part of the employee's personnel record.

Since the Board instituted its initial drug testing in December of 1989, four individuals have tested positive for drug/alcohol use: two teachers, one teacher applicant, and one employee in a non-safety-sensitive position. Three of those individuals were subject to drug testing on the basis of reasonable suspicion, and the other was subject to suspicionless pre-employment drug testing.

IV. DISTRICT COURT OPINION

A. Suspicionless Testing

The District Court applied the well-established balancing test to determine if the suspicionless drug testing program was lawful:

> [W]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.

(J.A. 52) (quoting *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989)).

Conducting the balancing test, the District Court found that the state's asserted interest in insuring student safety was "diminished appreciably" by the lack of "evidence that the problem of drug/alcohol abuse by the persons tested" or any evidence of "a teacher or other employee responsible for children has allowed any harm or even a

threat of harm to the children by being on the job in an impaired condition." (J.A. 57). The District Court also found that even if a teacher was impaired on the job, he or she would not pose the same risk of "disastrous" harm that courts have previously deemed sufficient to justify subjecting individuals to suspicionless drug testing. (J.A. 57) (referring to *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (railroad engineers) and *Rushton v. Nebraska Public Power District*, 844 F.2d 562 (8th Cir.1988) (nuclear power plant workers)).

Turning to the issue of individual privacy, the District Court found the testing procedures were "fairly intrusive," and infringed upon the legitimate expectations of privacy held by teachers and other professionals subject to the testing. (J.A. 58-59). The District Court rejected the argument that teachers had a "diminished expectation of privacy" because the provision of public education was heavily regulated by the state, reasoning that public education is not "an industry heavily regulated in terms of safety." (J.A. 58-59).

Balancing the intrusion on privacy that resulted from suspicionless testing against the state's interest in such testing, the District Court concluded that the balance tilted heavily in favor of individual privacy interests. Thus, the District Court held that the suspicionless testing program violated the Fourth Amendment.

B. Reasonable Suspicion Testing

The District Court ruled that the reasonable suspicion drug testing program was constitutional but that the reasonable suspicion alcohol testing program was constitutionally flawed.

1. Drug Testing

The District Court found that the Policy's requirements of reasonable cause sufficiently limited the discretion of officials administering the rule and comported with the reasonableness requirement of the Fourth Amendment. This led the District Court to conclude that "the Policy's reasonable suspicion testing procedures adequately protect the government's interest in removing drug impaired employees from their jobs without invading their reasonable expectations of privacy." (J.A. 62).

2. Alcohol Testing

The District Court found that the standards in the alcohol testing procedure were inadequate to protect the privacy interests of tested employees. The lack of standards, in combination with the fact that the level for a positive test was extremely low (at just one-fifth of the level required to test positive for drunk driving under Tennessee law), raised the possibility that an individual might test positive simply as a result of legal, off-duty consumpiton of alcohol. Finally, the District Court was concerned that under the Policy a law enforcement officer administers the test, despite the fact that Defendant now has its own equipment.

V. STANDARD OF REVIEW

The ultimate question presented in this case is the reasonableness of a Fourth Amendment search, which is a question of law that we review de novo. *United States v. Jones*, 133 F.3d 358, 360 (5th Cir.1998) ("The ultimate determination whether the search or seizure was reasonable under the Fourth Amendment is reviewed de novo."); *United States v. Cantley*, 130 F.3d 1371, 1375 (10th Cir. 1997) ("The reasonableness of a search and seizure under the Fourth Amendment is a question of law we review

de novo."). The application of res judicata and collateral estoppel are also questions of law that we review de novo. *United States v. Real Property Known and Numbered as 415 East Mitchell Avenue*, 149 F.3d 472, 476 (6th Cir. 1998) ("We review de novo the applicability of collateral estoppel."); *Heyliger v. State University and Community College System of Tennessee*, 126 F.3d 849, 851 (6th Cir.1997) (Court of Appeals reviews de novo a district court's decision regarding collateral estoppel or res judicata).

VI. ANALYSIS

The Fourth Amendment safeguards the privacy of individuals against arbitrary and unwarranted governmental intrusions by providing that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated".[9] However, "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402 (cites omitted). The reasonableness of a search "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985) (*citing New Jersey v. T.L.O.*, 469 U.S. 325, 337-342, 105 S.Ct. 733, 740-743, 83 L.Ed.2d 720 (1985)).

It is now well-settled that drug testing which utilizes urinalysis is a "search" that falls within the ambit of the Fourth Amendment. *See, e.g., Skinner*, 489 U.S. at 617, 109 S.Ct. 1402 (the collection and testing of urine in-

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[9] The Fourth Amendment, although initially applicable only to the federal government, is now applicable to states as well by virtue of selective incorporation through the Fourteenth Amendment. *See, e.g., Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

trudes upon expectations of privacy in such a way "that these intrusions must be deemed searches under the Fourth Amendment."). The Supreme Court jurisprudence in the area of drug testing is primarily reflected in four relatively recent decisions. Because an understanding of these cases is necessary to a meaningful analysis of the constitutionality of any drug testing regime, we briefly review those decisions.

In *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), the Court considered the government's interest in testing railroad employees for drugs and alcohol after a serious accident without a showing of individualized suspicion that drugs were involved. The Court began its analysis by noting that the "problem of alcohol use on American railroads is as old as the industry itself," and that alcohol was the probable cause or a contributing factor in at least 21 significant accidents occuring between 1972 and 1983, resulting in 25 fatalities, 61 non-fatal injuries, and property damages estimated at over $19 million. It was against this backdrop that the Court evaluated the Federal Railroad Administration's regulations which mandated post-accident toxicological testing for all employees involved in the accident, and led the Court to determine that the government's interest in such testing was compelling because the "[e]mployees subject to the tests discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. The Court also noted that:

> By ensuring that employes in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the ad-

> ministrative penalties associated with the prohibited conduct, *cf. Griffin v. Wisconsin*, 483 U.S. at 876, 107 S.Ct. at 3170, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

Skinner, 489 U.S. at 630, 109 S.Ct. at 1420. The avoidance of such calamities outweighed the employees privacy interests, which were "diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Skinner*, 489 U.S. at 627, 109 S.Ct. 1402. Testing without a showing of a particularized suspicion was essential to the realization of a deterrent effect—i.e., the employee's inability to avoid detection simply by staying drug-free at a prescribed test significantly enhanced the deterrent effect.

In *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), which was decided the same day as *Skinner*, the Court upheld the United States Customs Service's drug testing of employees seeking promotion or transfer to positions involved in the interdiction of illegal drugs, which required them to carry firearms. The Service's drug testing regime was not prompted by a pronounced drug problem, but by its stature as the "Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Von Raab*, 489 U.S. at 668, 109 S.Ct. 1384. The Court stated that it was "readily apparent" that the Government has a compelling interest in ensuring that the Service maintained unimpeachable integrity and judgment, and cautioned against the possibility of grievous consequences associated with having drug-using agents:

> This national interest in self-protection could be irreparably damaged if those charged with safeguard-

> ing it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

Von Raab, 489 U.S. at 670, 109 S.Ct. 1384. The Court further noted that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Von Raab*, 489 U.S. at 671, 109 S.Ct. 1384.

Some six years later, in *Vernonia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the Court reaffirmed the basic principals outlined by *Skinner* and *Von Raab*. In *Vernonia*, a school district implemented a random drug testing of students who participated in school athletic programs. The policy was prompted by a rampant increase in drug use, exacerbated by student athletes who were leaders of the drug culture. This caused significant concern because drug use increases the likelihood of sports related injury. The school district responded by offering presentations and classes to prevent drug use, but to no avail. Finally, with disciplinary problems at epidemic proportions and with a large segment of the student body (especially those involved in athletics) in a state of rebellion, the school administration, at its wits end, enacted a drug testing program for student athletes. The Court upheld the drug testing, noting that "students within the school environment have a lesser expectation of privacy than members of the population generally[,]" *Vernonia*, 515 U.S. at 657,

115 S.Ct. 2386 (citing *New Jersey v. TLO*, 469 U.S. 325, 348, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985)), and that school locker rooms are "not notable for the privacy they afford." *Vernonia*, 515 U.S. at 657, 115 S.Ct. 2386. Additionally, student athletes' expectation of privacy is reduced by their voluntary decision to "go out for the team," thus subjecting themselves to a higher degree of regulation and physical scrutiny than other students.

The Supreme Court most recently addressed the issue of drug testing in *Chandler v. Miller*, 520 U.S. 305, 117 S.Ct. 1295, 137 L.Ed.2d 513 (1997).[10] In *Chandler*, candidates for high office in Georgia brought suit challenging the constitutionality of a statute which required candidates to submit to and pass a drug test within 30 days prior to qualifying for a nomination to qualify for certain state offices. Balancing the candidates' privacy expectations against the State's interest in drug testing them, the Court held the statute unconstitutional. Specifically, the Court held that the suspicionless testing did not meet the Fourth Amendment's "special needs" exception to overcome the need for a individualized suspicion of wrongdoing. The Court's decision rested in large part upon the lack of a demonstrated drug problem among state officeholders, which, while not necessary in all cases, would have shored up the assertion of a special need for a suspicionless general research program. *Chandler*, at ——, 117 S.Ct. at 1303. Ultimately, this led the Court to conclude that the Fourth Amendment shielded against drug tests such as Georgia's candidate drug test, which diminished "personal privacy for a symbol's sake." *Chandler*, at ——, 117 S.Ct. at 1305.

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[10] The District Court did not have the benefit of *Chandler*, which post-dated the District Court's opinion in the instant case by about six weeks.

A. Suspicionless Testing

As a general rule, in order to be reasonable, a search must be undertaken pursuant to a warrant issued upon a showing of probable cause. *Skinner*, 489 U.S. at 619, 109 S.Ct. 1402 ("Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is acomplished pursuant to a judicial warrant issued upon probable cause."). That is, a valid search must ordinarily be based on an 'individualized suspicion of wrongdoing.' *Chandler*, at ——, 117 S.Ct. at 1301.

However, in *Chandler* the Court clarified how suspicionless testing—presumably inherently suspect because by definition it is not accompanied by individualized suspicion—can comport with the Fourth Amendment:

> But particularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." *Skinner*, 489 U.S. at 619, 109 S.Ct. at 1414 (internal quotation marks omitted). When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. See *Von Raab*, 489 U.S. at 665-66, 109 S.Ct. at 1390-91; see also *id.* at 668, 109 S.Ct. at 1392. As *Skinner* stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." 489 U.S. at 624, 109 S.Ct. at 1417.

Chandler, at ——, 117 S.Ct. at 1301. Thus, where a Fourth Amendment intrusion serves special needs, "it is necesary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 109 S.Ct. at 1390. Quite simply, then, in evaluating the constitutionality of the Board's drug testing Policy here, we must balance the government's (or public's) interest in testing against the individual's privacy interest.

1. Public Interest in Testing

With regard to the government's interest in testing, the Supreme Court has traditionally focused its analysis on two central factors: (1) whether the group of people targeted for testing exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and (2) the magnitude of the harm that could result from the use of illicit drugs on the job.

The existence of a pronounced drug problem within the group of employees targeted for testing typically tips the equities in favor of upholding suspicionless testing. For example, in *Skinner* the Court traced the history of drug and alcohol abuse among train operators and in *Vernonia* emphasized the rampant increase in drug use among students participating in school athletic programs —in both cases the existence of a pronounced drug problem contributed to the Court's upholding of the drug testing regimes. Likewise, in *Chandler*, the Court stated that the lack of a demonstrated drug problem among state officeholders in Georgia mitigated against allowing an unintrusive drug testing requirement. Thus, as would be expected when using a balancing test, in cases in which a

pronounced drug problem exists within the target group, a drug testing regime has a higher likelihood of being deemed constitutional because the more pernicious the drug problem is, the greater the public's interest is in abridging it.

In this case, there is little, if any, evidence of a pronounced drug or alcohol abuse problem among Knox County's teachers or other professional employees. Specifically, there is no empirical or historical evidence of an ongoing abuse problem (as in *Skinner*) or evidence of a newly blossoming epidemic of abuse (as in *Vernonia*). In fact, since the Policy was implemented in 1989, only one prospective hire has failed the suspicionless drug test.[11]

However, the existence of a pronounced drug problem is not a *sine qua non* for a constitutional suspicionless drug testing program. The Board argues that there is no indication that teachers are unaffected by the drug use affliction that affects our country as a whole, and that proof of a pronounced drug problem is unnecesary. The Board's argument relies heavily on *Von Raab*, in which the Court upheld a suspicionless drug testing program in the absence of a drug problem among Customs Service agents. In *Chandler*, the Court explained that *Von Raab* was based on a unique set of circumstances:

> Hardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context. As the Customs Service reported in announcing the testing program, "[Customs employees], more than any other Federal workers, are rou-

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11 Of course, this figure may be misleading in that it does not account for the deterrent effect the existence of the program has had on prospective employees, who know in advance that they are going to be tested.

> tinely exposed to the vast network of organized crime that is inextricably tied to illegal drug use." *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 173 (C.A.5 1987) (internal quotation marks omitted), aff'd. in part, vacated in part, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). We stressed that "[d]rug interdiction ha[d] become the agency's primary enforcement mission," *id.* at 660, 109 S.Ct. at 1387-88, and that the employees in question would have "access to vast sources of valuable contraband," *id.* at 669, 109 S.Ct. at 1392-93. Furthermore, Customs officers "ha[d] been the targets of bribery by drug smugglers on numerous occasions," and several had succumbed to the temptation. *Ibid.*
>
> Respondents overlook a telling difference between *Von Raab* and Georgia's candidate drug-testing program. In *Von Raab* it was "not feasible to subject employees [required to carry firearms or concerned with interdiction of controlled substances] and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." *Id.* at 674, 109 S.Ct. at 1395. Candidates for public office, in contrast, are subject to relentless scrutiny—by their peers, the public, and the press. Their day-to-day conduct attracts attention notably beyond the norm in ordinary work environments.

Chandler, at ——, 117 S.Ct. at 1304.

Just as the Customs agents in *Von Raab* must be considered in their own unique context, so too must the nature of the work and positions of school teachers and administrators be viewed as unique. We can imagine few governmental interests more important to a community than that of insuring the safety and security of its children

while they are entrusted to the care of teachers and administrators. Concomitant with this governmental interest is the community's interest in reasonably insuring that those who are entrusted with the care of our children will not be inclined to influence children—either directly or by example—in the direction of illegal and dangerous activities which undermine values which parents attempt to instill in children in the home. Indeed, teachers ocupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad. Teachers and administrators are not simply role models for children (although we would certainly hope they would be that). Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values of children. Teachers and administrators are not some distant societal role models, as in the case of the Georgia political candidates in *Chandler*; rather, on a daily basis, there is a direct nexus between the jobs of teachers and administrators and the influence they exert upon the children who are in their charge. Indeed, directly influencing children is their job.

The State of Tennessee has recognized and codified this role and obligation in TCA § 49-6-4203(b), which states that teachers shall serve in an *in loco parentis* capacity and are charged with the responsibility "to secure order and to protect students from harm while in their custody." Thus, by operation of law, during school hours and at school related events, teachers stand in the place of students' natural parents and are responsible for their safekeeping. The existence of this duty is itself "unique" to school teachers and administrators, and, we believe, is, by itself, great enough to overcome the presumption against suspicionless testing.

While serving in their *in loco parentis* capacity, teachers are on the "frontline" of school security, including drug interdiction. (J.A. 937; Griffin Dep., 162). While teachers may not be exposed to a vast network of organized crime in this capacity, they are faced with pervasive drug use in our schools,[12] and are perhaps in the best position to determine if a child is either in danger or involved with drugs. Indeed, a compilation of incidents in the Knox County school system reveals that there were 77 documented occurrences of substance abuse in 1996. That figure does not include, of course, all of the incidents that went undetected. In most cases, teachers and other school officials are responsible for reporting the prohibited activity. (J.A. 943; Griffin Dep., 168) ("If it weren't for the teachers we wouldn't have these reports in front of us."). Thus, unlike candidates for public office who may indirecly affect the lives of children as role models and policymakers, teachers directly influence and supervise children daily.

In further distinguishing *Chandler*, we also observe that teachers are not subject to the same day-to-day scrutiny as are candidates for public office, which would, at least to some extent, mitigate the need for suspicionless testing. Like Custom's agents, teachers do not work in an ordinary work environment in which they are constantly scrutinized by their peers and others; rather, they spend most of their days (about 6 hours) in the solitude of their classrooms surrounded only by students, some of whom

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12 The prevalence of drug use among our nation's youth is beyond dispute. According to the DEA, in 1996 18% of eighth graders used marijuana (up from 6% in 1991), and 34% of tenth graders used marijuana (up from 15% in 1992). In that same year, one in four tenth-graders and twelfth-graders reported using drugs in the previous 30 days; and fifteen percent of eighth-graders reported using drugs in the previous 30 days. According to the FBI, there were over 60,000 juvenile arrests for possession in 1994.

are very young, who may or may not be able to detect drug use among teachers. Even if a student did detect drug use by a teacher, that student would likely be wary of reporting such conduct for fear of being disbelieved, ridiculed, or retaliated against.

In short, although the record evidence does not reflect that the Knox County District school teachers and other such officials have a track record of a pronounced drug problem, the suspicionless testing regime is justified by the unique role they play in the lives of school children and the *in loco parentis* obligations imposed upon them.

The second factor we must consider in the balancing test analysis focuses on the magnitude of harm that could result from the use of illicit drugs in any given set of circumstances. In this case, the public interest proffered by the Board is that teachers, principals, and other such school personnel hold safety-sensitive positions and that the school district has a legitimate and strong interest in safeguarding the health and welfare of its students by ensuring that people in safety-sensitive positions are not under the influence of drugs or alcohol at school. The validity of this argument hinges in large part upon whether or not teachers, principals, and the other school officials covered by the testing actually occupy "safety-sensitive" positions.

As a threshold matter, the Court rejects the Board's assertion that the issue of whether teachers are safety-sensitive employees has already been decided in its favor in prior litigation between the parties, and that res judicata and collateral estoppel bar the re-litigation of that issue. The doctrine of res judicata or claim preclusion states that a final and valid judgment on the merits of a claim precludes subsequent action on that claim. The doctrine precludes re-litigation on claims actually litigated as

well as claims that could have been litigated. *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.4, 116 S.Ct. 1761, 1765 n.4, 135 L.Ed.2d 76 (1996) ("The doctrine of res judicata rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction."); *Heyliger v. State University and Community College System of Tennessee*, 126 F.3d 849, 852 (6th Cir.1997). Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

In December of 1989, the Defendant Board of Education adopted a "Drug-Free Workplace Policy," which was revised several times over the course of the next two and a half years. In 1991, Plaintiff in the instant case, KCEA, filed suit challenging the policy on Fourth Amendment grounds ("KCEA I"). In that case, the district court noted that the policy did not describe the methods or procedures to be followed in obtaining or testing urine samples, nor did it assure the employee applicants that their privacy interests in the results would be protected. This led the court to conclude: "Because the privacy interests of the professional employee applicants in this case are not protected at all by the policy as it is written, the court finds that *for this reason alone* the policy must fail constitutional examination." (J.A. 282) (emphasis added).

However, the court did not end its inquiry at that point. The court addressed the second part of the balancing test to examine whether the governmental interests were strong

enough to test all professional employees, irrespective of the nexus their position had to the safety of the children. The court then found that of the professional employee positions subject to pre-employment drug screening, principals (and assistant principals), teachers (and traveling teachers), teacher aids, and school secretaries occupied safety sensitive positions because "[a]ny lapse in attention or judgment on the part of these employees could result in an immediate threat to a child's safety." (J.A. 284-85). This led the court to conclude:

> Thus, *even if the policy adequately protected the privacy interests of the professional employees, and the court finds that it does not*, the only professional employees which the court considers subject to pre-employment testing are principals, assistant principals, teachers, traveling teachers, teacher aids, and school secretaries.

(J.A. 287) (emphasis added)

Despite the fact that the district court continued its inquiry to include an analysis of which employees qualified as safety sensitive, it is obvious that this determination was not necessary to the ruling finding the drug testing scheme unconstitutional. In order to find that either doctrine bars the re-litigation of an issue, the issue must have been "necessary to support the judgment entered in the prior proceeding." *NLRB v. Master Slack*, 773 F.2d 77, 81 (6th Cir.1985). *See also Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015-16 (6th Cir.1983) ("The determination of an issue in an earlier proceeding must be essential to the judgment; it cannot be dicta.") (citing *Anthan v. Professional Air Traffic Controllers Org.*, 672 F.2d 706, 710 (8th Cir.1982)). The district court clearly ruled that because the privacy interests of the employee were not protected at all by the drug testing scheme as it existed at that time that the testing was unconstitutional. By the court's own statement, that reason alone was suf-

ficient to render the scheme unconstitutional, and any further explanation of its unconstitutionality was gratuitous and constitutes dicta. The court reiterated the alternative nature of the ruling when it stated that "even if the policy adequately protected the privacy interests of professional employees, and the court finds that it does not, the only professional employees which the court considers subject to pre-employment testing are principals, assistant principals, teachers, traveling teachers, teacher aids, and school secretaries." (J.A. 287).

Clearly, then, the court's ruling on which employees occupied safety-sensitive positions was not essential to the disposition of the case, and, therefore, cannot preclude Plaintiff from litigating that issue in this case.[13] Thus, the Court must proceed in making its own determination of whether teachers and other school administrators occupy safety-sensitive positions.

Under *Skinner*, the test for whether employees hold safety sensitive positions is whether the employees "discharge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. In *Skinner*, which involved drug testing for railroad engineers, the Court stated that a locomotive "becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs," and that drug use among these employees "can cause great human loss before any signs of impairment become noticeable to supervisors or

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13 Defendant also spends a great deal of its brief arguing that the District Court erred by not taking judicial notice of the safety-sensitive ruling from the prior litigation. This contention is plainly without merit. The statement in KCEA I that teachers hold safety-sensitive positions is not the type of undisputable fact of which the court may take judicial notice under Rule 201 of the Federal Rules of Evidence.

others." *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402. Courts have found similar risks inherent in several other positions, including: nuclear power plant workers [14], seamen operating oil tankers [15], a meter repairman for a gas company [16], a firefighter and emergency medical technician [17], a process technician at a petro-refining facility [18], police officers [19], a bus driver [20], and pipeline operators [21].

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[14] *Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir.1988).

[15] *Exxon v. Exxon Seamen's Union*, 73 F.3d 1287, 1294 (3rd Cir. 1996) ("A clearly defined and cautiously administered program of drug testng . . . is the natural corollary to . . . a strong public policy that precludes allowing intoxicated or drug-impaired seamen to remain in safety-sensitive positions aboard oil tankers.").

[16] *Mountaineer Gas Company v. Oil, Chemical & Atomic Workers International Union*, 76 F.3d 606, 609 (4th Cir.1996) (court implicitly accepted district court and arbitrator's finding that gas meter repairman occupied a safety sensitive position).

[17] *Saavedra v. Albuquerque*, 73 F.3d 1525, 1532 (10th Cir.1996).

[18] *Gulf Coast Industrial Workers Union v. Exxon*, 991 F.2d 244, 250 (5th Cir.1993). As a process technician, Woods was freely transferable into assignments involving the supply of electricity, steam, water, and nitrogen to other parts of the plant. These volatile gases and liquids are produced and handled at extremely high temperatures and pressures. The court held "that it offends public policy for Woods, an employee who occupies a safety-sensitive position, to retain his job upon testing positive for cocaine while on the job and after having breached his company's drug abuse policy on two occasions[.]"

[19] *Ford v. Dowd*, 931 F.2d 1286, 1290 (8th Cir.1991).

[20] *Tanks v. Greater Cleveland Regional Transit Authority*, 930 F.2d 475, 480 (6th Cir.1991).

[21] *International Brotherhood of Electrical Workers v. Skinner*, 913 F.2d 1454, 1463 (9th Cir. 1990). That decision also noted several other cases in which courts have upheld random drug tests for employees with safety-sensitive, security-sensitive, or public-integrity-sensitive jobs. *See, e.g., Bluestein v. Skinner*, 908 F.2d 451 (9th Cir.1990) (airline industry personnel); *Taylor v. O'Grady*, 888 F.2d 1189, 1199 (7th Cir.1989) (correctional officers in regular con-

Thus, in order to show that school teachers and administrators also occupy safety-sensitive positions, the Board must demonstrate a "clear, direct nexus . . . between the nature of the employee's duty and the nature of the feared violation." *Georgia Association of Educators v. Harris*, 749 F.Supp. 1110, 1115 (N.D.Ga.1990) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 490 (D.C.Cir.1989), *cert. den. sub. nom., Bell v. Thornburgh*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990)).

Although the position of school teacher may not fit neatly into the prototypical "safety-sensitive" position,[22]

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tact with inmates); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 893 (D.C. Cir.1989) (various transportation workers), *cert. denied*, 495 U.S. 923, 110 S.Ct. 1960, 109 L.Ed.2d 321 (1990); *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 615 (D.C.Cir.1989) (Army civilian guards), *cert. denied*, 493 U.S. 1056, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990); *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir.1989) (per curiam) (civilian workers in Army chemical weapons plant); *Harmon v. Thornburgh*, 878 F.2d 484, 496 (D.C.Cir.1989) (Justice Department employees with clearance for top-secret information), cert. denied sub nom. *Bell v. Thornburgh*, 493 U.S. 1056, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990); *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.) (per curiam) (police officers carrying firearms or engaged in drug interdiction efforts), *cert. denied*, 493 U.S. 963, 110 S.Ct. 404, 107 L.Ed.2d 370 (1989); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 567 (8th Cir. 1988) (nuclear power plant engineers); *Transport Workers' Union v. Southeastern Pennsylvania Transp. Authority*, 884 F.2d 709, 713 (3d Cir.1988) (mass transit workers).

[22] In fact, we are aware of three decisions which have ruled either implicitly or explicity that teachers do not occupy safety-sensitive positions. *See, Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School Dist.*, 119 A.D.2d 35, 505 N.Y.S.2d 888, 891 (1986) (proposition that "illegal drug usage can have an adverse impact upon a teacher's ability to safeguard and supervise pupils" did not render teachers safety-sensitive employees under applicable law); *Georgia Ass'n of Educators v. Harris*, 749 F.Supp. 1110 (N.D.Ga.1990) (enjoining pre-employment drug testing of all applicants for state employment including teacher applicants); *Bangert v. Hodel*, 705 F.Supp. 643, 649

we do not read the definition of "safety-sensitive" so narrowly as to preclude application to a group of professionals to whom we entrust young children for a prolonged period of time on a daily basis. Simple common sense and experience with life tells us "that even a momentary lapse of attention can have disastrous consequences," *Skinner*, 489 U.S. at 628, 109 S.Ct. 1402, particularly if that inattention or lapse were to come at an inopportune moment. (See testimony of Grant at J.A. 958-59; Staley at J.A. 996-98). For example, young children could cause harm to themselves or others while playing at recess, eating lunch in the cafeteria (if for example, they began choking), or simply while horsing around with each other. Children, especially younger children, are active, unpredictable, and in need of constant attention and supervision. Even momentary inattention or delay in dealing with a potentially dangerous or emergency situation could have grievous consequences.

This is equally true of teaching at the high school level. Not only must teachers observe and report drug use, but they are also charged, by law, with reporting assaults as well. TCA § 49-6-4301(a) provides that "[e]very teacher observing or otherwise having knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of the school." Fifty such incidents occurred in Knox County schools in

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(D.D.C.1989) (enjoining random drug testing of Department of Interior employees, including teachers in Bureau of Indian Affairs).

But see, Aubrey v. School Board of Lafayette Parish, 92 F.3d 316 (5th Cir.1996) (appeals court reversed and remanded case in which district court had granted summary judgment because the record did not contain enough evidence to determine whether a school janitor, who's job description included handling chemical solvents, operating a lawn mower, working with electricity, and lighting gas pilots, occupied a safety sensitive position).

the 1995-96 school year, and 77 in the 1994-95 school year.[23]

The Court believes that a local school district has a strong and abiding interest in requiring that teachers and other school officials be drug-free so that they can satisfy their statutory obligation to insure the safety and welfare of the children. The fact that the Board has not been able to cite any one specific example in which a teacher or other employee responsible for children has allowed any harm to the children by being in an impaired condition while on the job is certainly not dispositive of the question of whether teachers and administrators hold "safety-sensitive" positions. We do not believe that the Board must wait passively for a disaster to occur before taking preemptive action to minimize the risks of such an occurrence. Indeed, we have no doubt that if a tragedy were to befall one or more of the school children of Knox County that in some manner implicated a teacher or administrator being under the influence of an illegal substance, the members of that community would rightly question why the Board had not taken all efforts possible in advance to prevent such an occurrence.

Finally, we would be remiss if we did not point out that the safety sensitive nature of a teacher's or adminis-

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[23] Indeed, we do not have to search beyond recent local and national media headlines to understand that schools are, unfortunately, too often turned into places in which children are subject to grave and even life-threatening dangers wherein the split-second vigilance of teachers and administrators, and the need for clear-headed thinking, is absolutely critical to the safety of the school children. Whether we consider the recent tragic schoolyard shootings in Jonesboro, Arkansas and Springfield, Oregon, or simply the myriad media reports of children being found in schools with dangerous weapons, we intuitively understand the importance of insuring that those who are responsible for the safety and security of children while they are at school must at all times be prepared to exercise clear, unimpaired judgment and leadership.

trator's job is not limited to the necessity to act at the immediate time of a dangerous event. Rather, school personnel perform an essential monitoring role in preventing incidents from occurring in the first place. Teachers and administrators are in a unique position to observe children and learn if they are involved in activities which can lead to harm or injury to themselves or others. Clearly, if school personnel are themselves under the influence of, or involved in, drugs, their ability to perform this critical function is not only reduced, but they themselves are open to being compromised and undermined. Clearly, a school board has a very strong interest in preventing this as part of its responsibility to insure the safety and security of school children.

2. Privacy Interest of Employees

Having ruled that the public interest in suspicionless testing is very strong, an analysis of the employee's privacy rights is necessary to determine which of the competing values should prevail in this case.[24] As will be-

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[24] Although not raised by the parties in their briefs, the Court questioned at oral argument the Union's standing to bring this action in order to protect the employees' privacy rights. Generally, such Fourth Amendment issues require a showing of particularized individual injury by the person asserting the violation. *See, e.g., Rakas v. Illinois*, 439 U.S. 128, 133, 99 S.Ct. 421, 425, 58 L.Ed.2d 387 (1978) ("Fourth Amendment rights are personal and may not be asserted vicariously."). At oral argument, counsel for the Board informed the Court that he did not raise the issue because it had been raised in KCEA I, but dismissed by Judge Jordan.

In any event, a union does have representational standing to challenge the constitutionality of an alcohol and drug testing policy on behalf of its members. *See, e.g., Von Raab*, 489 U.S. at 663, 109 S.Ct. 1384 (the plaintiffs, a union of federal employees and a union official, commenced suit on behalf of Customs Service employees challenging the constitutionality of drug testing under the Fourth Amendment); *Skinner*, 489 U.S. at 612, 109 S.Ct. 1402 (the plaintiffs, the Railway Labor Executives' Association and its various

come evident in the course of this analysis, because teachers' legitimate expectation of privacy is diminished by their participation in a heavily regulated industry and by the nature of their job, the public interest in suspicionless testing outweighs that private interest. Again, we read the Supreme Court precedents assessing the privacy interests of employees as focusing on two central factors: (1) the intrusiveness of the drug testing scheme; and (2) the degree to which the industry in question is regulated.

We begin by noting that drug testing does implicate the privacy interests of employees on several levels. As the Supreme Court noted in *Skinner*, urination is an intensely private and personal act. *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402 ("There are few activities in our society more personal or private than the passing of urine.").[25] The "physical intrusion infringes an expectation of privacy that society is prepared to recognize as reasonable . . . [and][t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests." *Skinner*, 489 U.S. at 616, 109 S.Ct. 1402. In fact, the testing is deemed a search precisely because it implicates concerns about bodily integrity. *Skinner*, 489 U.S. at 617, 109 S.Ct. 1402. Furthermore, "the limitation on an individual's freedom of

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member labor organizations, brought suit against the Secretary of Transportation challenging drug testing regulations for railway employees under the Fourth Amendment). Therefore, it is clear that the Union has standing because the Policy applies to employees who are already members of the Union, but who transfer to safety-sensitive positions.

[25] Although we are prepared to recognize the privacy interest identified here, we believe this characterization of the level of the privacy expectation may be somewhat overdrawn. Anybody who has stood in line in men's room urinals at sports stadiums, public arenas, theaters or public bars understands that the act of urination is not always an altogether private one.

movement that is necessary to obtain blood, urine, or breath samples" also amounts to a Fourth Amendment violation, if unreasonable. *Skinner*, 489 U.S. at 618, 109 S.Ct. 1402.

Although the drug testing regime presented in this case is, in certain respects, somewhat more intrusive than other regimes, judged as a whole it is fairly circumscribed and unintrusive. It does not include a random testing component, and only tests those people who are candidates for, and attempting to transfer to, a select group of positions. There is no ongoing testing once an applicant has received the job and passed the initial test. All specimens identified as positive are re-tested and confirmed using an advanced testing procedure. The testing procedures include extensive involvement from a Medical Review Officer (MRO), who reviews every positive result to determine if there is an alternative medical explanation for the result and conducts an interview with the individual testing positive and reviews his or her medical records to determine if the positive result was caused by a legally prescribed medication.

Further, the Policy recognizes that information regarding an individual's drug testing results is confidential and provides extensive safeguards concerning the release and dissemination of the testing information, specifically that the results "will be released by the MRO and the Director of Personnel only upon the written consent of the individual, except the results may be released and relied upon by the Knox County Board of Education in any administrative or court action by the employee involving the drug test, or any discipline resulting from a violation of this policy, including employment and court proceedings." (J.A. 1016-17). The Policy further provides that the substance screens wil be maintained by the MRO in a secure fashion and disclosed to the Director of Personnel only

to the extent necessary to address any work-related safety risks occasioned by either the drug or alcohol use. All personnel records and information regarding referral, evaluation, substance screen results, and treatment are to be maintained in a confidential manner and no entries concerning such will be placed in the employee's personnel file. In effect, two separate files wil be maintained: one with the MRO indicating the results of the substance abuse tests and another maintained as the employee's personnel record.

With respect to the procedures for insuring the individual's privacy during the actual taking of the urine sample itself, the Policy provides that the urine sample may be given by the individual in private without any monitoring, except in those cases in which there is reason to believe that the individual will adulterate the sample. Although this may be more invasive than some policies, it is not unreasonable. For all of these reasons, we find that the drug testing requirement here is only minimally intrusive and is only so broad as to achieve the legitimate objectives of the Policy.

Plaintiff contends that the drug testing procedures themselves violate the Fourth Amendment by testing for eighteen different drugs, eleven of which are not drugs included in the Department of Transportation procedures and which can be found in common medicines.

The tests screen for the following drugs: marijuana, cocaine, phencyclidine, amphetamines, methamphetamine, phenobarbital, secobarbital, amobarbital, butalbital, pentobarbital, propoxyphene, methadone, morphine, codeine, monacetilmorphine, and benzodiazepines. (J.A. 1017). In this respect, the Policy departs from D.O.T. procedures, which allow testing for five (but effectively seven)[26]

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[26] This qualification is necessary because, although the D.O.T. only tests for five drugs (marijuana, cocaine, opiates, amphetamines,

of these eighteen drugs. The five drugs tested for under the D.O.T. guidelines are classified as Schedule I, II, or III drugs under the Controlled Substances Act, whereas the remaining drugs for which Defendant screens include Schedule IV and V drugs, i.e., drugs that have an accepted medical use and a lower potential for abuse. The additional drugs for which Defendant screens can be found in medications such as Robitusson A-C and Robitusson DAC (used to treat chest colds); Axocet, Egsic-Plus, Fiorinal, Fioricet, and Sedapap (used to treat tension headaches); Arco-Lase Plus and Donnatal (used to relieve gastrointestinal disorders); Bellergal (used to treat menopausal disorders); Quadrinal (used to treat athma and chronic bronchitis); and Valium and Dizac (used to treat stress).

The Department of Health and Human Services has approved testing protocols and positive threshold levels only for the five drugs specified in the D.O.T. procedures, and, consequently, uniform standards are not available for testing for the presence of other drugs, federal drug-testing certification of laboratories to conduct such tests is not available, and the federal medical review officer procedure (used by the Board) provides little guidance in reviewing the results of such drug tests. The DOT regulations, which Defendant's drug testing Policy is modeled after to some extent, have specifically rejected allowing employers to test for additional drugs using the DOT urine sample because "[t]esting for additional drugs increases the privacy intrusion of testing[,]" and "may make court approval of DOT-required testing more difficult." 49 C.F.R. Part 40. The regulations specifically note the drawbacks

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and phencyclidine), a urinalysis for opiates discloses the presence of both morphine and codeine, and a urinalysis for amphetamines discloses the presence of methamphetamines, and, thus, the D.O.T. procedures allow testing for seven of the drugs for which Knox County tests.

of testing for drugs other than the five specifically approved of in *Skinner:*

> DHHS-approved testing protocols and positive thresholds for drugs beyond the five for which testing is now required do not exist. DHHS certification of laboratories does not extend to testing of any of the additional drugs. Consequently, the uniform standards crucial to the accuracy and integrity of the testing process, which courts have relied upon in upholding Federally-required drug testing, are not now in place for the additional drugs. This absence of uniform standards could also make defense of the DOT regulations in court more difficult.
>
> There are also unresolved practical problems that could result from DOT permitting employers to use the "DOT sample" to test for additional drugs. Many of the additional substances commentators expressed a desire to test for are widely available as prescription drugs (e.g., barbiturates). The Medical Review Officer's task in determining whether the drug use indicated by the test is legitimate (and hence not a verified positive) is likely to be significantly more difficult in dealing with legal prescription drugs. The use of DOT-mandated tests to discover the presence of a variety of legal prescription drugs, and therefore to permit employer inferences about otherwise confidential medical conditions, could not be prevented.
>
> For these reasons, the Department believes that it is inadvisable at this time to grant employers the discretion to test the "DOT sample" for additional drugs.

49 C.F.R. Part 40.

As the DOT regulations recognize, testing for the additional drugs has some shortcomings, including increasing the privacy intrusion by revealing more in-depth information about the subject and the lack of uniform standards for testing for the additional drugs. Although the Court expresses concern over this portion of the test, and believes the testing for these drugs may be unnecessary, the shortcomings highlighted by the DOT regulations are insufficient to render the test unconstitutional. The Policy protects against the false positives by having the MRO conduct an interview with the individual testing positive and by enabling the MRO to review the individual's medical history and medical records to determine if the positive result was caused by legally prescribed medication. While this may make the drug testing process slightly more intrusive, because if individuals test positive for one of these additional drugs they may have to divulge additional personal medical history in order to vindicate themselves, that intrusiveness is minimized by the Policy's disclosure requirements. That is, because the Policy only requires that the employee reveal the information to the MRO, the additional privacy invasion is minimal.

With respect to the expectation of privacy of school personnel, we must first inquire into the degree with which the teaching and school administration is regulated by the state. The Board contends that the employees subjected to the drug testing participate in a heavily regulated profession and, accordingly, have a diminished expectation of privacy. In support of this contention, the Board cites a panoply of Tennessee regulations that apply to schools in general, and specifically to students, school boards, and teachers. The District Court ruled that teachers do not have a diminished expectation of privacy because those regulations do not, for the most part, apply to teachers

regarding safety. (J.A. 58).[27] We find the District Court erred in its ruling that to be heavily regulated, the regulations in question had to relate exclusively to safety, as this view is simply not supported by the relevant authority.

Under the relevant Supreme Court precedents discussed above, the expectation of privacy associated with not submitting to a drug test may be diminished if the employee participates in a heavily regulated industry. *See, e.g., Vernonia,* 515 U.S. at 657, 115 S.Ct. 2386 (students that volunteer for student athletics are analogous to employees in heavily regulated industries); *Skinner,* 489 U.S. at 620, 109 S.Ct. 1402 (railroad employees in a heavily regulated industry).

In *Skinner,* the Court explained in detail how the expectations of railroad operators are greatly diminished by their participation "in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Skinner,* 489 U.S. at 627, 109 S.Ct. 1402. The Court continued on to state:

> This relation between safety and employee fitness was recognized by Congress when it enacted the Hours of Service Act in 1907, *Baltimore & Ohio R. Co. v. ICC,* 221 U.S. at 619, 31 S.Ct. at 625, and also when it authorized the Secretary to "test . . . railroad facilities, equipment, rolling stock, operations, or persons, as he deems necessary to carry out

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[27] The District Court's entire analysis on this issue was as follows:

> The defendant argues that education is heavily regulated in Tennessee by statute and regulation, and that the employees working in that area therefore have a diminished expectation of privacy. I disagree. The statutes and regulations to which the defendant refers do not, for the most part, deal with safety. (J.A. 58).

> the provisions" of the Federal Railroad Safety Act of 1970. 45 U.S.C. § 437(a) (emphasis added). It has also been recognized by state governments, [Footnote omitted] and has long been reflected in industry practice, as evidenced by the industry's promulgation and enforcement of Rule G. Indeed, the FRA found, and the Court of Appeals acknowledged, see 839 F.2d at 585, that "most railroads require periodic physical examinations for train and engine employees and certain other employees." 49 Fed. Reg. 24278 (1984). [Cites omitted].
>
> We do not suggest, of course, that the interest in bodily security enjoyed by those employed in a regulated industry must always be considered minimal. Here, however, the covered employees have long been a principal focus of regulatory concern.

Skinner, 489 U.S. at 627-28, 109 S.Ct. 1402.

In *Vernonia*, the Court analogized student athletes to the heavily regulated employees of the railroad industry, stating:

> There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App. 17), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Rec-

> ord, Exh. 2, p. 30, P 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner*, 489 U.S. at 627, 109 S.Ct. at 1418-19; *United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972).

Vernonia, 515 U.S. at 657, 115 S.Ct. 2386.

Contrary to the District Court's ruling that the regulations at issue had to relate specifically to safety regarding students, the regulations in both *Skinner* and *Vernonia* indicated that the focus was much broader. In *Skinner*, the Court noted that facilities, equipment, operations, and employees in the industry were subject to regulation, although the health of the covered employees was the principal concern. In *Vernonia*, the Court analogized student athletes to participants in a heavily regulated industry in part because of safety regulations, but also because of regulations requiring them to maintain a minimum grade point average, and to comply with any "rules of conduct, dress, training hours and related matters" of each sport. *Vernonia*, 515 U.S. at 657, 115 S.Ct. 2386. These cases demonstrate that the entire focus of the regulations need not be on the employees themselves, or relate to safety *per se*, in order for the industry to be considered heavily regulated.

As the Board's brief makes clear, regulations concerning Tennessee public schools generally are legion. These regulations include those promulgated by the School Security Act of 1981 which recognized the position of schools "in loco parentis and the responsibility this places on principals and teachers within each school to secure order and to protect students from harm while in their

custody." T.C.A. § 49-6-4203(b). Various state regulations apply to the implementation of drug abuse education, school safety and security, discipline, drug use among students, the search of students lockers for drugs and weapons (including a provision specifically providing that "information received from a teacher" may provide the basis for a search), and a requirement that local school boards formulate a code of acceptable behavior and discipline, as well as attendance, curriculum and report cards.

Perhaps most notably, the state legislature has imposed a requirement for teachers and principals to report student offenses, which states:

> Every teacher observing or otherwise having knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of such school. Every principal having direct knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property or receiving a report of such action shall report such action immediately to the municipal or metropolitan police department or sheriff's department having jurisdiction.

T.C.A. § 49-6-4301(a). Thus, the state legislature has acknowledged the role of the teacher and principal as front-line observers in providing for a safe school environment, and, in fact, has imposed on them a duty to report matters that endanger life, health, or safety.

Furthermore, state law also regulates teachers and principals, setting forth their duties, responsibilities, certification, qualification and licensing requirements. T.C.A. § 49-5-101, et. seq. While state law provides for teacher tenure and imposes certain procedural safeguards in the

event a teacher were to face dismissal or suspension, it also sets out reasons for which a teacher may be dismissed or suspended, including the "improper use of narcotics or intoxicants." T.C.A. § 49-5-501(3)(E).

Thus, the Court believes that when people enter the education profession they do so with the understanding that the profession is heavily regulated as to the conduct expected of people in that field, as well as the responsibilities that they undertake toward students and colleagues in the schools. It does not matter, as the District Court seemed to emphasize, that most of the regulations do not deal with safety *per se*, although, as noted, a number of the regulations are, in fact, related to safety. As *Vernonia* and *Skinner* make clear, our general focus is not whether teachers are heavily regulated, but if they participate in a heavily regulated profession or industry. In this case, the "industry"—public schools—is heavily regulated, and much of that regulation focuses on the conduct of teachers and principals. As noted above, certain portions of Tennessee law specifically require teachers and principals to report activity endangering "life, health, or safety," and other regulations relate to drug use in the schools. Given this level of regulation, the Court finds that teachers should not be surprised if their own use of drugs is subject to regulation and testing and, as such, their expectation of privacy, at least with respect to drugs and drug usage, might be diminished.

That a teacher's expectation of privacy as to drug use might be diminished is further underscored by the unique role teachers play in the lives of our nation's children. As we have noted, teachers are not just role models, but mentors, friends, and in some cases, parent-figures that stand in the place of absent parents. Teachers leave indelible impressions on the minds of their young students, because they are entrusted with the safe keeping and education of

children during their most impressionable and formative years. Therefore, teachers must expect that with this extraordinary responsibility, they will be subject to scrutiny to which other civil servants or professionals might not be subjected, including drug testing.

For all of the reasons stated here, we believe that the privacy interest for the employees not to be tested is significantly diminished by the level of regulation of their jobs and by the nature of the work itself. The ultimate inquiry before the Court is whether the search at issue here—the one-time, suspicionless testing of people hired to serve in teaching and administrative positions—is reasonable. On balance, the public interest in attempting to ensure that school teachers perform their jobs unimpaired is evident, considering their unique *in loco parentis* obligations and their immense influence over students. These public interests clearly outweigh the privacy interests of the teacher not to be tested because the drug-testing regime adopted by Knox County is circumscribed, narrowly-tailored, and not overly intrusive, either in its monitoring procedures or in its disclosure requirements. This is particularly so because it is a one-time test, with advance notice and with no random testing component, and because the school system in which the employees work is heavily regulated, particularly as to drug usage.

Therefore, we REVERSE the District Court's finding this portion of the statute unconstitutional.

B. Suspicion-Based Testing

The Court now turns to the suspicion-based testing, and finds that this portion of the Policy is also constitutional under the Fourth Amendment.

1. Drug Testing

The Policy provides for testing of an employee if the Director of Personnel "reasonably suspects" that an employee's work performance or on-the-job behavior may have been affected by illegal drugs or alcohol. The Policy further enumerates the circumstances under which substance screening may be considered, which include, but are not limited to, the following:

> 1. Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.
>
> 2. Apparent physical state of impairment of motor functions.
>
> 3. Marked changes in personal behavior not attributable to other factors.
>
> 4. Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected or employee involvement in a pattern of repetitive accidents, whether or not they involve actual or potential injury.
>
> 5. Violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs and/or violations of drug statutes.

(J.A. 1011). These requirements of "reasonable cause" sufficiently limit the discretion of the officials administering the rule and, because the testing is clearly based upon a finding of individualized suspicion, this portion of the Policy comports with the reasonableness requirement of the Fourth Amendment. Thus, for these reasons and those identified by the District Court, we AFFIRM the District Court's ruling on this aspect of the suspicion-based testing program.

2. *Alcohol Testing*

However, the District Court did find one portion of the suspicion-based test unconstitutional. The District Court ruled that the Policy's alcohol testing procedures violated the Fourth Amendment for three reasons: (1) the Policy itself provides that the initial breathalyzer test be carried out by the Knox County Sheriff's Department, thereby implicating serious privacy concerns as the results would instantaneously be in the hands of law enforcement personnel; (2) the Policy did not require compliance with the extensive procedural rules that the Department of Transportation requires regarding ensuring the accuracy of test results; and (3) the alcohol content required for a positive result was so low (.02) that it might easily return a positive result based solely on legal, off-duty ingestion of alcohol.

The Policy's requirement that the breathalyzer test be carried out by law enforcement personnel does implicate serious privacy concerns. The problem with having law enforcement officers administer the test is that they will have immediate access to the results. This publication converts the testing from a matter peculiarly within the scope of the employment relationship to one which directly involves law enforcement authorities. Therefore, in contrast to the other portions of the test which only require disclosure to the MRO in the first instance, the disclosure of the alcohol testing results are much broader, thereby leading to a higher degree of intrusiveness.

However, as noted earlier, testimony at trial indicated that Defendant no longer conducts its alcohol testing through the Sheriff's office but through its own personnel, trained and certified in the operation of the breathalyzer. Thus, as a practical matter, the privacy concerns implicated by this additional disclosure no longer exist. We

recognize, as the District Court did, that the fact that the language in the Policy requires the testing to be carried out by law enforcement officials makes it possible for the Board to revert to this method, causing an unnecessary invasion of the employee's privacy. But, the mere possibility of this encroachment does not factor heavily in the Court analysis.[28]

A second issue is whether the alcohol testing procedures lack many of the safeguards necessary to insure the accuracy of the breathalyzer machine, and the appropriateness of the testing protocol. Plaintiff claims that, in marked contrast to the DOT regulations, the Policy does not contain detailed guidelines regarding the administration of the breathalyzer test, including training required for individuals who administer breathalyzers (49 C.F.R. Pt. 40.51), standards for machines that may be used for breathalyzers (49 C.F.R. Pt. 40.53), calibration standards for breathalyzer machines (49 C.F.R. Pt. 40.55), standards to insure the visual and aural privacy of individuals subjected to breathalyzers (49 C.F.R. Pt. 40.63), and standards for administering confirmation tests (49 C.F.R. Pt. 40.65).

It may well be that the Policy is deficient in this regard, i.e., it does not provide all the safeguards that the DOT Procedures do regarding breathalyzer tests. But, this aspect of the test, by itself, is not defective enough to engender constitutional concerns. The alcohol testing procedures set out in the Policy state that if a breath analysis test is positive, a second breath analysis test must be taken. (J.A. 1018). In the event of a positive reading, a urine test will be administered. The alcohol urinalysis

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[28] Indeed, it seems unlikely, especially in light of the Court's admonition here, that the Board would revert to having law enforcement officials conduct the test.

will be an EMIT screen followed by confirmatory gas chromatography tests on positive screens. Either test will be considered positive if the results are .04 or more. Regarding urine collection and testing, the Policy specifically states that the lab "will follow the Department of Transportation Procedures for preparation for testing, chain of custody, security, privacy, integrity, and identity of specimen, and any necessary transportation to a laboratory. See 49 C.F.R. Part 40 § 40.23 and 40.25." (J.A. 1018). *See also*, J.A. 1017 ("Specimens will be collected in accordance with Department of Transportation Procedures for Transportation Work-place Drug Testing Programs 49 C.F.R. Part 40 which are incorporated herein by reference, with exceptions as noted in this Policy."). Thus, as to this aspect, there are sufficient safeguards.

However, while the exact procedures employed during the alcohol testing do not themselves render the test unconstitutional, the Policy's low threshold (.02) for a positive result does call into question the constitutionality of that portion of the test. The District Court noted that the .02 level is one-fifth the statutory level which would constitute driving under the influences of alcohol in Tennessee, *see* T.C.A. § 55-10-401(a)(2), and concluded that the level was "so low that it might easily return a positive result based solely on legal, off-duty ingestion of alcohol." (J.A. 63).

Based on the record before us, the Court is unable to make a determination as to whether this portion of the test is constitutional. For a search to be reasonable under the Fourth Amendment, it must be "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). *See also, Rutherford v. Albuquerque*, 77 F.3d 1258, 1263 (10th Cir.1996) (finding drug testing unreasonable in part be-

cause it screened for off-duty drug use which was wholly unrelated to employer's asserted interest in on the job safety); *National Treasury Employees Union v. Yeutter*, 918 F.2d 968, 974 (D.C.Cir.1990) (finding reasonable suspicion drug testing program unreasonable that tested non-safety sensitive employees for off-duty drug use). As the District Court noted, the record does not contain any evidence regarding whether the broad range of the alcohol testing and particularly the low threshold is reasonably related to the purpose of the testing, nor does it indicate the amount and timing of consumption that would result in that low level reading. Therefore, it is unclear from the record why the Board believes impairment at the relatively low .02 level is significant, and how that level is related to the purpose of the testing. It may be that there is no such nexus and, if this is so, this portion of the Policy is indeed unconstitutional. However, we cannot conclude that from this record (just as we cannot conclude that there is some relationship between the nature of the test and levels established and the identified need for testing). Therefore, the issue of whether this portion of the test is constitutional is REVERSED AND REMANDED to the District Court to determine whether the .02 level is reasonably related to the purpose of the testing.

VII. CONCLUSION

Therefore, for the reasons stated,

The District Court's ruling as to the suspicionless testing portion of the Policy is REVERSED. The District Court's ruling as to the suspicion-based portion of the Policy's AFFIRMED, except regarding the issue of whether the alcohol testing is constitutional which is REVERSED AND REMANDED for proceedings not inconsistent with this opinion.

APPENDIX B

[Filed Mar. 4, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

No. 3:95-cv-193

KNOX COUNTY EDUCATION ASSOCIATION,
Plaintiff

v.

KNOX COUNTY BOARD OF EDUCATION,
Defendant

MEMORANDUM OPINION

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983. On Fourth Amendment grounds, the plaintiff, the employees' union for the professional employees of the defendant school system, makes a facial attack on the defendant Knox County Board of Education's "Drug-Free Workplace Substance Abuse Policy" (the Policy). Plaintiff also claims that the Policy violates the Americans with Disabilities Act, the Tennessee Constitution, and the Knox County Tenure Act. The matter was tried to the undersigned on November 12, 1996. The following constitutes this court's findings of fact and conclusions of law in conformity with Rule 52, Federal Rules of Civil Procedure.

I.

Findings of Fact

1. Plaintiff Knox County Education Association is the employees' organization for the professional employees of the Knox County School System.[1] The defendant Knox County Board of Education is the political body responsible for the administration, management, and control of the Knox County School System.

2. No evidence was presented from which it could be found that there is a pronounced drug and/or alcohol abuse problem among Knox County's teachers or other professional employees.

3. On June 1, 1994, the Board of Education met in regular session and voted to adopt a "Drug-Free Workplace Substance Abuse Policy" for implementation in the Knox County School System. The Policy establishes a comprehensive drug and alcohol testing program for the Board of Education's employees. The Policy notes that the Federal Anti-Drug Act, 41 U.S.C. § 702, requires federal grant recipients, such as the Board, to establish a drug-free workplace. The Policy describes its goals and objectives as follows:

> 1. To establish, promote, and maintain a safe, healthy, working and learning environment for employees and students.
>
> 2. To aid the affected employee in locating a rehabilitation program for employees with self-admitted or detected substance abuse problem.

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[1] Plaintiff represents the teachers, principals, supervisors, superintendent, school and central office clerks and secretaries, and teachers' aides. It does not represent other, non-professional employees of the Knox County Board of Education; for example, the school bus drivers. This court's opinion is therefore limited to the employees represented by the plaintiff.

3. To promote the reputation of the Knox County School System and its employees as responsible citizens of public trust and employment.

4. To eliminate substance abuse problems in the workplace.

5. To aid in the reduction of absenteeism, tardiness, and apathetic job performance.

6. To provide a clear standard of job performance for Knox County Schools employees.

7. To provide a consistent model of substance-free behavior for students.

Defendant's Ex. 1, § .02. Although all of the above are mentioned in the policy, it is clear from the trial of this case that the primary policy consideration the Board of Education is concerned with is the safety of the students entrusted to it; that is, that a student might be injured because of the inattentiveness or negligence of a drug or alcohol impaired teacher or other employee having responsibility for the student. However, no evidence was presented to indicate that any student in the Knox County School System has ever been injured or harmed in any way because a supervising teacher or other employee was impaired by drugs or alcohol while at work. The defendant contends that the threat is so great and the safety interest so important that no evidence of such a past harm is necessary.

4. The Policy divides the tested employees into two distinct groups: those who may only be tested for reasonable suspicion of drug or alcohol impairment while at work (all employees) and those who may be the subject of suspicionless testing (those who may be tested pre-employment for "safety-sensitive" positions, pre-transfer to "safety-sensitive" positions, and upon return to duty after

undergoing rehabilitation). The Policy notes that there are several positions which are considered "safety-sensitive." It defines them as "positions where a single mistake by such employee can create an immediate threat of serious harm to students and fellow employees." The Policy notes that safety-sensitive positions requiring post-offer, pre-employment drug testing are: principal, assistant principal, teacher, traveling teacher, teacher aide, substitute teacher, school secretary, and school bus driver. Individuals applying for other non-safety sensitive positions are not required to submit to suspicionless substance abuse tests.

5. The substance abuse policy prohibits any Board of Education employee from being under the influence of an illegal drug or alcohol while on duty, on Knox County Board of Education property, or in attendance at a System-approved or school-related function. § .04.

6. Section .05 of the Policy provides for drug and/or alcohol screening based upon reasonable suspicion, as follows:

> Whenever the Knox County Board of Education, through its Director of Personnel or the person authorized to act as the Director in the Director's absence, and/or the Medical Review Officer, reasonably suspects that an employee's work performance or on-the-job behavior may have been affected in any way by illegal drugs or alcohol, or that an employee has otherwise violated the Knox County Board of Education Drug-Free Workplace Substance Abuse Policy, the employee may be required to submit a breath and/or urine sample for drug and alcohol testing. When a supervisor observes or is notified of behaviors or events that lead the supervisor to believe that the employee is in violation of the Drug-

Free Workplace Substance Abuse Policy, the Supervisor should notify the Director of Personnel.

An employee who is required to submit to drug/alcohol testing based upon such reasonable suspicion and refuses will be charged with insubordination and [subjected to the disciplinary sanctions which that raises, including possible termination].

Further, an employee testing positive on a reasonable suspicion test will be found to be in violation of the Policy, and violation of the Policy will constitute grounds for termination. The Policy notes that the School System Director of Personnel, or the person authorized to act in that person's absence, or the Medical Review Officer are the only individuals in the Knox County School System authorized to make the determination that reasonable suspicion or cause exists to order a drug screen and the only individuals in the School System who may order an employee to submit to a drug screen.

7. The Policy describes two types of cases for which the reasonable suspicion procedures may be invoked:

(1) Chronic case

Deteriorating job performance or changes in personal traits characteristics where the use of alcohol or drugs may be reasonably suspected as the cause. These cases may develop over a fairly long period of time.

(2) Acute case

Appearing in a specific incident or observation to then be under the present influence of alcohol and/or drugs or investigation of an accident where the use of alcohol or drugs is reasonably suspected to be a contributing cause. Regard-

> less of any previous history, immediate action is necessary.

The Policy goes on to provide that "[c]ircumstances under which substance screening may be considered, in either the chronic or acute cases, include but are not limited to the following:"

> (1) Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.
>
> (2) Apparent physical state of impairment of motor functions.
>
> (3) Marked changes in personal behavior not attributable to other factors.
>
> (4) Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected or employee involvement in a pattern of repetitive accidents, whether or not they involve actual or potential injury.
>
> (5) Violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs and/or violations of drug statutes.

The Policy states that the circumstances under which drug screening may be considered "are strictly limited in time and place to employee conduct on duty or during work hours, or on or in Knox County Board of Education property or at School System-approved or school related functions."

8. Section .11 of the Policy describes the drug and alcohol abuse testing procedures. The Knox County

Board of Education has designated a physician as the Medical Review Officer (MRO). The MRO is responsible for reviewing the results of drug tests before they are reported to the Knox County Board of Education's Director of Personnel; reviewing and interpreting each confirmed positive test to determine if there is an alternative medical explanation for the positive result; conducting an interview with the individual testing positive; reviewing the individual's medical history and medical records made available to the individual to determine if the positive result was caused by legally prescribed medication; requiring a re-test of the original specimen if the MRO deems it necessary; and verifying that the laboratory report and the specimen are correct. The MRO is expected to follow the Medical Review Officer's Manual published by the U.S. Department of Health and Human Services. If the MRO determines that there is a legitimate medical explanation for the positive test other than the use of a prohibited drug, the MRO will conclude that the test is negative and take no further action. If the MRO concludes that a particular test is scientifically insufficient, the MRO will conclude that the test is negative for that individual. If the MRO determines that there is no legitimate explanation for the positive test other than the use of a prohibited drug, the MRO will communicate the test results as a positive to the Director of Personnel.

9. The policy itself identifies the National Psychopharmacology Laboratory, Inc. (NPL) to perform the drug tests in accordance with applicable Department of Transportation procedures, 49 C.F.R. part 40. The NPL is said to be responsible for handling specimens for alcohol testing. Since the Policy was written, however, the defendant has switched to another laboratory, called LabCorp, to perform the testing.

10. Urine specimens in the case of drug testing are to be collected in accordance with Department of Transpor-

tation Procedures for Transportation Workplace Drug Testing Programs, 49 C.F.R. part 40. The Policy says that the designated collection site shall have an enclosure within which private urination can occur, a toilet for completion of urination, and a source of water for washing hands. Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen.

11. The initial test performed on the urine at the laboratory will be the Enzyme-Multiplied Immunoassay Technique (EMIT) screen which will be used to eliminate negative urine specimens from further consideration. All specimens identified as positive on the initial test will then be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques. The tests will screen for the following drugs: marijuana, cocaine, phencyclidine, amphetamines, methamphetamine, phenobarbital, secobarbital, amobarbital, butalbital, pentobarbital, propoxyphene, methadone, morphine, codeine, monacetilmorphine, and benzodiazepines.

12. With respect to the alcohol testing procedures, the Policy provides only that the Knox County Sheriff's Department will be requested to perform and will be responsible for administering a breath analysis test. If the breath analysis test is positive, a second breath analysis test may be taken. The breath analysis test level to be considered positive will be .02. The alcohol urine assay will be an EMIT screen followed by confirmatory gas chromatography tests on positive screens. Either test will be considered positive if the results are .04 or more. Section 12.B provides the specific testing procedure to be used in the case of reasonable suspicion testing.

13. Procedurally the Policy describes the Reasonable Suspicion Testing as follows:

Once the determination has been made that an employee is to be tested based upon reasonable suspicion, the Director of Personnel should then transport the employee to the collection site, or make other appropriate arrangements for transportation. The collection site personnel should be notified that the reason for testing is reasonable suspicion.

Upon arriving at the collection site, the employee will be asked to sign a release for testing and to assist in completing the necessary forms for testing. After the employee has signed the necessary releases for testing, then the standard procedures for drug and alcohol testing should be followed by the collection site personnel.

Once the procedure has been completed, the employee should be transported back to the Director of Personnel's office where the employee will be placed on administrative leave with pay until the results of the tests are available and given instruction to call the Director of Personnel each work day, before the normal reporting time for that employee, for further instructions.

If the employee refuses to sign the release or refuses to be tested by NPL, the employee should be advised that refusal under the Board Policy is insubordination. If the employee continues to refuse, the employee should be transported back to the Director of Personnel's office. The Director of Personnel will place the employee on administrative leave with pay with instructions to call his/her office before the normal reporting time for that employee on the following work day.

If the Director of Personnel feels that the employee is in no condition to operate a vehicle, then the employee should be transported home. . . .

> In the event of positive test results, the MRO will contact the Director of Personnel who will then review other records of the employee and contact the Knox County Law Director to work out proper disciplinary procedures, . . .

14. The Policy recognizes that information regarding an individual's drug testing results is confidential and "will be released by the MRO and the Director of Personnel only upon the written consent of the individual, except the results may be released and relied upon by the Knox County Board of Education in any administrative or court action by the employee involving the drug test, or any discipline resulting from a violation of this policy, including employment and court proceedings." The Policy further provides that the substance screens will be maintained by the MRO in a secure fashion and disclosed to the Director of Personnel only to the extent necessary to address any work-related safety risks occasioned by either the drug or alcohol use. All personnel records and information regarding referral, evaluation, substance screen results, and treatment are to be maintained in a confidential manner and no entries concerning such will be placed in the employee's personnel file. In effect, two separate files will be maintained: one with the MRO indicating results of the substance abuse tests and another maintained as the employee's personnel record. Ex. 1 at § .10.

15. Since the reasonable suspicion testing was initiated in 1994, the proof demonstrated that only two tests have been performed under the standard and only one of those was positive.

16. The Policy also allows for suspicionless testing in two situations with respect to persons applying for positions identified by the Board of Education as "safety-

sensitive." Those positions are principal, assistant principal, teacher, traveling teacher, teacher aide, substitute teacher, school secretary, and school bus driver. The Policy provides that all applicants being considered for employment in safety-sensitive positions are required to submit to a urinalysis test for the detection of illegal use of drugs, as part of the required post-offer, pre-employment physical. Applicants for such positions are to be given a copy of the Policy in advance of the physical. Applicants are to sign an acknowledgement prior to substance screening, permitting the summary result to be transmitted to the MRO and the Director of Personnel. An applicant refusing to complete any part of the drug testing procedure will not be considered a valid candidate for employment with the School System and the refusal will be considered as withdrawal of the individual's application for employment. The applicant will then not be permitted to reapply for employment with the School System for at least 12 months and not until "the applicant shows proof of successful completion of a drug rehabilitation program or proof that the applicant has otherwise rehabilitated successfully and is no longer engaging in illegal drug use."

If substance screening shows a confirmed positive result for which there is no current physician's prescription, a second confirming test may be requested by the MRO. If the first or any requested second confirming test is positive, any job offer will be revoked. The pre-employment testing is for the same drugs as is the reasonable suspicion testing.

17. The Policy also provides that where a current employee applies for a position identified by the Board of Education as safety-sensitive, the employee will be subject to drug testing in conformity with the procedures contained in the policy. An employee who tests positive for

illegal drugs on a promotion/transfer test, will no longer be considered an applicant for that position and will be considered in violation of the policy. Violation of the policy will constitute grounds for immediate termination. There have been no positive tests of any of the employees for promotion and transfer since the Policy was implemented. Prior to the present school year, only one positive pre-employment drug screen was found out of the 100 to 200 new teachers hired each year by the Knox County School System.

18. The plaintiff contends that the list of employees to whom the suspicionless pre-employment and transfer or promotion testing provisions apply is overly broad and includes employees whose positions are not in fact safety-sensitive. In addition, plaintiff contends that the "reasonable suspicion" provisions are virtually unlimited and undefined, also in violation of the Fourth Amendment to the United States Constitution and Article I, Sections 7 and 8, of the Tennessee Constitution.

Plaintiff contends that the policy violates the Americans with Disabilities Act in that it allows medical testing of employees exceeding the limitations of that Act and requires the disclosure of confidential medical information not required by business necessity.

Plaintiff contends that the testing procedures are unreasonable and include procedures which have the effect of testing for off-the-job drug or alcohol use without a significant nexus to on-the-job impairment. Plaintiff contends that the policy represents an arbitrary abuse of the Board's authority and violates the rights of tenured teachers under the Due Process Clause of the Fourteenth Amendment, as well as the Tennessee Constitution and the Knox County Tenure law, in that it regulates off-duty conduct and subjects employees to disciplinary action as

the result of off-duty conduct not affecting their performance. Plaintiff contends that the Policy does not provide adequate assurance of the maintenance of privacy and confidentiality of the test results.

19. The defendant contends that the employees who its Policy identifies as "safety-sensitive" are those having duties where they supervise children and are responsible for their safety. The Board contends that any lapse in attention or judgment on the part of these employees could result in an immediate threat to a child's safety. Accordingly, defendant contends that the Policy is constitutionally sound.

In addition, defendant contends that its safety interests as balanced with the individual applicants' or employees' privacy interests render the Policy reasonable under the United States and Tennessee Constitutions. Likewise, defendant contends that the reasonable suspicion testing is constitutional.

Defendant contends that the Drug-Free Workplace Policy adequately protects the privacy interests of the employees and is wholly consistent with the factors identified by the United States Supreme Court in such cases. Defendant claims that the circumstances under which substance screening may be considered under the Policy are strictly limited to school-related conduct.

Further, defendant contends that the Policy is fully consistent with the ADA and the Knox County Tenure Act.

II.

Conclusions of Law

1. The court first considers the questions raised by the suspicionless drug testing of job applicants and job transferees into the positions identified by the Policy as "safety-

sensitive." On three occasions, the United States Supreme Court has considered the constitutionality of suspicionless drug testing. *See Vernonia School Dist. 475 v. Acton*, —— U.S. ——, 115 S.Ct. 2386 (1995); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989); *Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989). Each case arose in a different context, but each is instructive in this case. The three cases establish a balancing test that is easy to state, but often difficult to apply.

The Supreme Court has clearly recognized that a urinalysis conducted by a governmental agency constitutes a "search" within the meaning of the Fourth Amendment. *See Skinner*, 489 U.S. at 616. The Supreme Court observed that "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable." *Skinner*, 489 U.S. at 617. In *Von Raab*, the Court ruled that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 109 S.Ct. at 1390. One court has noted that the *Von Raab* balancing test is inherently, and doubtless intentionally, imprecise. *Willner v. Thornburgh*, 928 F.2d 1185, 1187 (D.C. Cir. 1991).

Before applying the Supreme Court's balancing test to this case, it would be helpful to briefly review *Skinner*, *Von Raab*, and *Vernonia*. In *Skinner*, the Court considered the government's interest in testing railroad employees for drugs after a serious accident without a showing of individualized suspicion that drugs were involved. The court found the government's interest to be compelling because the "[e]mployees subject to the tests dis-

charge duties fraught with risks of injury to others that even a momentary lapse of attention can have disastrous consequences." 489 U.S. at 628. The Court found that the testing would supply a valuable means of deterring employees engaged in safety-sensitive tasks from using controlled substances, and that the testing could also provide invaluable information about the causes of major railroad accidents. *Id.* at 630-31. Regarding the degree of invasion of privacy, the employees in *Skinner* were found to have a reduced expectation of privacy by reason of participating in an industry that is regulated pervasively to ensure safety, and that, toward this goal, most railroads require employees to undergo periodic physical examinations. 489 U.S. at 627. Finally, in evaluating *Skinner*, the severity of the problem which the government was addressing was an important factor. The Supreme Court began the *Skinner* opinion with observations concerning the century-long history of wide-spread alcohol and substance abuse among employes which had led to an unacceptable level of property damage, serious injury, and death. *Id.* at 607-08.

2. *Von Raab* was decided on the same day as *Skinner*. There, the Court upheld the United States Customs Service's drug testing of its employees who were involved in the interdiction of illegal drugs and who had positions requiring them to carry firearms. *Von Raab*, 489 U.S. at 672. That policy required those employees, without a warrant or individualized suspicion, to produce urine samples for random drug screening. The Court reasoned that this administrative practice was justified by a special governmental need to ensure that those particular Customs employees had unimpeachable integrity and judgment. *Id.* at 674. These heavily regulated employes also had a lessened privacy expectation against the government's intrusion. The Court observed that the Customs Service is

"our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population." *Id.* at 668. In *Von Raab*, the Customs Office did not demonstrate a history of drug abuse among the employees to be tested. The Court in *Von Raab* found a nexus between the risks of drug use by its Customs agents and imminent hazards to public safety. The Court explained how the government's interest would be undermined by unlawful drug use among its front-line personnel: "A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizeable drug shipments or block apprehension of dangerous criminals." *Von Raab*, 489 U.S. at 670. In addition, the Court recognized that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Id.* at 671.

3. The narrow focus of the exceptions created in *Von Raab* and *Skinner* was reaffirmed in *Vernonia School District 47J v. Acton*, —— U.S. ——, 115 S.Ct. 2386 (1995). There, the Court upheld random urinalysis drug testing of students who participated in a school district's athletics programs. The school district in question began the policy of random urinalysis of student athletes in response to a severe drug problem among the school students. The district court found that not only were student athletes included among the drug users, but were the leaders of the drug culture. *Id.* at 2389. This caused the school administrators particular concern, since drug use increases the risk of sports-related injury. Not only was there a past history of a severe drug problem among the group to be tested and a direct nexus with potential injury, but the group at which the tests were directed had a reduced expectation of privacy. Students within the

school environment have a lesser expectation of privacy than members of the population generally. *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (Powell, J., concurring). The Court noted that legitimate privacy expectations are even less with regard to student athletes, noting that "school locker rooms . . . are not notable for the privacy they afford." Further, the Court observed an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. The Court analogized student athletes to adults who choose to participate in a "closely regulated industry," in that when they voluntarily participate in school athletics they have reason to expect intrusions upon normal rights and privileges, including privacy. *Acton*, 115 S.Ct. at 2386.

4. The Supreme Court has not, and probably could not, provide a complete list of all the factors to be weighed in balancing the government's interest against the individual privacy interest. Clearly, the state's interest may be increased based on the nature and degree of the harm threatened by drug or alcohol abuse. In *Skinner* and *Von Raab*, the degree of danger threatened by on-the-job drug or alcohol abuse was very great. The Court also noted that a documented history of a serious drug and/or alcohol abuse problem increases the intensity of the government's interest. Thus in *Skinner*, the long history of alcohol/drug abuse by railroad workers and resulting catastrophic accidents heightened the government's interest. Similarly, in *Vernonia*, the student athletes' history of drug abuse as a group and position as role models for the rest of the student body increased the weight of the government's interest.

With respect to the circumstances that make up an individual's privacy interest, there are a number of factors which are important. First, the nature of the position occupied by the person to be searched is important. In both *Von Raab* and *Skinner*, the employees were in industries which were heavily regulated in terms of safety and therefore employees had a reduced expectation of privacy. Similarly, in *Vernonia*, the student athletes had a severely reduced expectation of privacy. The intrusiveness of the testing procedures are also important. The testing procedures run the gamut from allowing a person to be tested by his own physician and thereby obtain an affidavit of a negative drug test, *see Chandler v. Miller*, 73 F.3d 1542 (11th Cir. 1996), to observed forced urination, *see Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1540 (6th Cir. 1988). Another important factor is what is done with the results of the urine sample; *i.e.*, can it be turned over to law enforcement officials? In addition, the reliability of the results to provide information which is expected to be provided is an important consideration. Does it reveal medical information other than the test results sought?

5. Turning first to suspicionless testing, the court observes that, at first glance, the state's interest in this case is high. No one would question that the state's interest in ensuring the safety of our children is of paramount importance. However, upon closer examination of the facts of this case, the state's interest diminishes appreciably. There is no documented evidence of a problem with drug/alcohol abuse by the persons to be tested. The defendant has not been able to point to a single example where a teacher or other employee responsible for children has allowed any harm or even a threat of harm to the children by being on the job in an impaired condition. The defendant argues that it need not provide a history

of drug/alcohol impairment problems to justify suspicionless testing. *See Von Raab*, 489 U.S. 656. However, such a documented history would add weight to the government's interest. The definition for the term "safety-sensitive" which has been utilized following *Skinner* and *Von Raab* is said to be employees who "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 109 S.C. at 1419. While one can imagine a scenario where a momentary lapse of attention by a teacher could have disastrous consequences, the likelihood of disastrous consequences is not as high as it would be in the case of a railroad engineer, *see Skinner*, or a worker in a dangerous nuclear power facility, *see Rushton v. Nebraska Public Power District*, 844 F.2d 562, 566 (8th Cir. 1988).[2]

Balanced against the government's interests are the privacy interests of the teachers and other employees subject to testing. The Supreme Court has observed that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable. In *Skinner*, the Court, quoting the Fifth Circuit, identified this interest as follows:

> There are few activities in our society more personal or private than the passing of urine. Most people define it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social

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[2] The Knox County School System employees in the most "safety-sensitive" positions are probably the school bus drivers. However, those drivers are not members of the plaintiff union in this case, and the court cannot and therefore does not consider the reasonableness of the Policy as applied to them.

customs. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987).

Skinner, 109 S.Ct. at 1413. I find that teachers and other plaintiffs in this case have no lesser expectation of privacy than do any other government employees. They are not like the railroad workers in *Skinner* who voluntarily participate in an industry that is regulated heavily to ensure safety, nor are they akin to the student athletes in *Vernonia* who have a diminished expectation of privacy in the public school custodial setting.

The defendant argues that education is heavily regulated in Tennessee by statute and regulation, and that the employees working in that area therefore have a diminished expectation of privacy. I disagree. The statutes and regulations to which the defendant refers do not, for the most part, deal with safety.

In addition, the urination testing in this case is fairly intrusive. While it does not require direct observation of forced urination, it is clearly more intrusive than other methods which have been used. *See Chandler v. Miller*, 753 F.3d 1543 (11th Cir. 1996) (permitting testing to be done by candidate's physician); *Willner v. Thornburgh*, 928 F.2d 1185 (D.C. Cir. 1991) (sample produced in private).

The court concludes that the balance tilts heavily in favor of the plaintiff in this case. The members of plaintiff's union have no past documented history of drug and/or alcohol abuse, they do not participate in an industry heavily regulated in terms of safety, and they have not accepted a reduced expectation of privacy in choosing their profession. The search they are forced to submit to is an intrusive one, yet the defendant attempts to carry out the search without any suspicion that the person to be tested has abused drugs or alcohol. The court con-

cludes that suspicionless testing under these circumstances violates the Fourth Amendment to the United States Constitution.

6. Turning now to suspicion-based testing, the court finds that searches based on reasonable suspicion stand on different ground than suspicionless searches. The Supreme Court has observed that, generally, searches performed without a warrant must be based on probable cause that the person to be searched has violated the law. *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). However, when countervailing circumstances preclude the insistence upon a probable cause showing, the Supreme Court has required "some quantum of individualized suspicion" to satisfy the reasonableness requirement of the Fourth Amendment. *Skinner*, 489 U.S. at 624. With regard to reasonableness, the Sixth Circuit Court of Appeals has observed:

> What is reasonable, of course, "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest."

Carrelli v. Ginsburg, 956 F.2d 598, 604 (6th Cir. 1992) (quoting *Penney v. Kennedy*, 915 F.2d 1065, 1069 (6th Cir. 1990) (internal citations omitted). The Fourth Amendment prohibits only "unreasonable" searches. In the criminal area, the probable cause standard has been particularly applicable. *See Von Raab*, 489 U.S. at 667. However, in the civil or administrative area, a "reasonable cause" standard is generally more appropriate. Determining the reasonableness of any search involves a two-fold inquiry: first, one must consider "whether the . . . action

was justified at its inception," *Terry v. Ohio*, 392 U.S. at 20; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," *id.*

In the instant case, the School System employees are required to comply with the regulations that prohibit drug use. Before the Director of Personnel, or his designee, or the MRO can request a urine sample from the employee, the rule requires the official to demonstrate "reasonable cause" for that drug screen or breathalyzer examination. The defendant's Policy goes on to provide several specific examples of what might constitute reasonable cause. Those examples include, but are not limited to, the following:

> 1. observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs;
>
> 2. apparent physical state of impairment of motor functions;
>
> 3. marked changes in personal behavior not attributable to other factors;
>
> 4. employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected or employee involvement in a pattern of repetitive accidents, whether or not they involve actual or potential injury;
>
> 5. violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs and/or violations of drug statutes.

I find that these requirements of "reasonable cause" sufficiently limit the discretion of the officials administering

the rule and comport with the reasonableness requirement of the Fourth Amendment. Employees are aware that they may be subject to drug screening if a certain quantum of suspicion is attained. Because of the nature and purpose of the search to be performed, it would not generally be feasible or desirable to bring the criminal process into play and obtain a warrant. ˇ conclude that the Policy's reasonable suspicion testing procedures adequately protect the government's interests in removing drug impaired employees from their jobs without invading their reasonable expectations of privacy.

7. However, there is one area of defendant's reasonable suspicion drug and/or alcohol testing where there are constitutional problems—the area of testing for alcohol impairment. Initially, the court notes that the policy itself provides that the initial breathalyzer test is to be carried out by the Knox County Sheriff's Department. There was some testimony at trial that the School System now has "its own equipment" to carry out the test, but as long as that language remains in the Policy it makes easy an unnecessary invasion of the employee's privacy. In addition, when the breathalyzer test is taken, the Policy specifically provides that a .02 blood/alcohol level would result in a positive finding.[3] There is no evidence in the record to indicate what a .02 reading actually means, but the court notes that it is one-fifth of the statutory level which would constitute driving under the influence of alcohol in Tennessee, *see* T.C.A. § 55-10-401(a)(2), and one-half of the blood alcohol concentration which would constitute impairment if one was engineering a train. *See Skinner*, 109 S.Ct. at 1408.

---

[3] Defendant apparently decided upon this level based on Department of Transportation regulations dealing with railroad engineers, truck drivers, and other employees engaged in transportation. *See* 49 C.F.R. §§ 40.3; 40.53; 40.63. A confirmatory test would be positive upon a reading of .04.

There is nothing in the Policy requiring the Sheriff's Department to comply with the extensive procedural rules that the Department of Transportation requires with regard to transportation workers to ensure accuracy of test results. The problem with this aspect of the alcohol testing is that the level of alcohol content rendering a positive result is so low that it might easily return a positive result based solely on legal, off-duty ingestion of alcohol. That this could occur is another violation of the employees' privacy rights. I conclude that the defendant's reasonable suspicion alcohol testing Policy on its face violates the Fourth Amendment.

8. The plaintiff contends that the Policy also violates the Americans with Disabilities Act. However, plaintiff has not explained how the Policy violates the Act. The ADA specifically provides that an employee may hold an alcoholic employee to the same performance and behavior standards to which the employer holds other employees "even if an unsatisfactory performance is related to the alcoholism of such employee." 42 U.S.C. § 12114(c)(4). Similarly, an employee who is charged for the misconduct of possession of heroin, rather than his disability of heroin addiction, cannot state a cause of action under the Rehabilitation Act. *Taub v. Frank*, 957 F.2d 8 (1st Cir. 1992). There is nothing in the Policy which would demonstrate that its application would violate any particular right of plaintiffs under the ADA.

9. Plaintiff's claim under the Tennessee Constitution is brought under Article I, Section 7. Section 7 is identical in intent and purpose with the Fourth Amendment to the United States Constitution. *Sneed v. State*, 423 S.W.2d 857 (1968). For that reason, the result in this case is the same under either the Tennessee or United States Constitution.

10. Plaintiff's claim under the Knox County Tenure Act raises a novel question of state law and the court declines to exercise its pendent jurisdiction over such claim.

III.

Conclusion

Because the court cannot construe all of the defendant's Policy to be constitutional, the Policy can be "saved" only by applying the principle of severance. According to that principle, "whenever an Act . . . contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court to so declare, and to maintain the Act insofar as it is valid." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion) (quoting *El Paso & Northeastern Railroad Company v. Gutierrez*, 215 U.S. 87, 96 (1909)). By definition, however, this principle is meaningful only if the unobjectionable portion of the statute "is fully operative as a law." *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam).

The principle of severance is applicable in this case because once the objectionable provisions are excised (those permitting any suspicionless drug testing and the procedures for alcohol testing upon reasonable suspicion), the remainder of the Policy can stand on its own.

Accordingly, the court finds that the Knox County Board of Education's Drug-Free Workplace Substance Abuse Policy is unconstitutional and violates the Fourth Amendment to the extent that it permits any suspicionless drug testing and in the manner by which it permits alcohol testing upon reasonable suspicion. The court enjoins the Board from further implementation and enforcement of those sections of the Policy. The court finds the remainder of the Policy, as applied to this plaintiff, to be facially valid.

Order accordingly.

/s/ James H. Jarvis
JAMES H. JARVIS
United States District Judge

APPENDIX C

[Filed Feb. 4, 1999]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

97-5405/5408

KNOX COUNTY EDUCATION ASSOCIATION,
Plaintiff-Appellee/Cross-Appellant,

v.

KNOX COUNTY BOARD OF EDUCATION,
Defendant-Appellant/Cross-Appellee.

BEFORE: NELSON and RYAN, Circuit Judges; and ROSEN,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

---

* Hon. Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

RONALD LEE GILMAN, Circuit Judge, with whom Chief Judge MARTIN and Judges DAUGHTREY and COLE join, dissents. A panel of this court recently upheld the Knox County Board of Education's policy of drug-testing all candidates for teaching positions in the Knox County public schools. The Knox County Education Association's petition for an *en banc* re-hearing has now been denied. Because we believe that the panel's September 29, 1998 decision in this case conflicts with the Supreme Court's holding in *Chandler v. Miller*, 117 S.Ct. 1295 (1997), we respectfully dissent.

In *Chandler*, the Supreme Court held that a Georgia policy requiring all candidates for public office to submit to drug tests violated the Fourth Amendment's requirement that a search be justified either by particularized suspicion or by "special needs" beyond crime detection. *See Chandler*, 117 S.Ct. at 1301. In determining that the small group of exceptions to the particularized suspicion requirement did not encompass the elected officials covered by Georgia's policy, the Court reviewed its cases that set forth those exceptions. *See id.* at 1301-02. We do not believe that the exceptions to the particularized suspicion requirement of the Fourth Amendment upon which the panel relies extend to candidates for teaching positions.

In *Skinner v. Railway Labor Executives Commission*, 489 U.S. 602 (1989), the Court held that drug and alcohol tests of railroad employees who had been involved in accidents or who had violated safety regulations were permissible under the Fourth Amendment, even absent particularized suspicion of drug or alcohol use. It is worthwhile to note that involvement in an accident or violation of a safety regulation is a circumstance that sets *Skinner* apart from the present case, in which candidates for teaching positions are tested regardless of any unique

circumstances. Furthermore, the justifications for testing absent particularized suspicion that existed in *Skinner* are not present here. In *Skinner*, the Court stated that drug and alcohol use by railroad employees could "cause great human loss before any signs of impairment become noticeable to supervisors." *See id.* at 628. The Board of Education articulates no convincing parallel with teachers. Although it is true that drug use is unsafe among teachers, the Board points to no circumstance in which the result of waiting until there is suspected drug use before testing a teacher would be so immediate and catastrophic that it outweighs the teaching candidates' Fourth Amendment right to be free from unreasonable searches.

Nor do we agree that the decreased expectation of privacy that the *Skinner* court held applicable to persons who participate in a heavily regulated industry applies to candidates for teaching positions. *See* 489 U.S. at 627. The *Skinner* opinion refers to the railroad industry as "heavily regulated to insure safety." *See id.* The fact that school systems are heavily regulated does not put them in the same category as railroads. Schools are not special or unique in the level of *safety* regulation that applies to them. Schools are not particularly dangerous places, nor does the behavior of any one school employee ordinarily expose students or other staff to immediate or catastrophic danger. The fact that public schools are heavily regulated in terms of what they can teach and how students and teachers may behave does not justify requiring teachers to sacrifice personal liberties based upon safety considerations that are not relevant to the school environment.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660-61 (1989), is also a case where unique and substantial safety concerns create an exception to the particularized suspicion requirement. In that case, the

Court sustained a United States Customs Service policy of drug-testing employees who apply for transfer to positions that directly involve drug interdiction or require the employee to carry a firearm. The Court justified this exception to the particularized suspicion requirement because of safety concerns not present in this case. Furthermore, in *Von Raab*, the employees who were subjected to testing had access to large amounts of confiscated illegal drugs and with the persons carrying them. *See id.* at 668. Thus Customs Service employees are potentially more dangerous by reason of their weapons, and more vulnerable to drug use by reason of their access to drugs, than are teachers in the Knox County Schools. Like railroad employees, customs officials can pose an immediate threat to safety that overrides their Fourth Amendment freedom from searches.

The panel's opinion makes much of the importance of schools as the first line of defense against drug use, and of their duty to prevent it. In *Von Raab*, the Court stated that the "almost unique mission" of the Customs Service to prevent drugs from entering the country helped justify the drug tests. The panel was correct in stating that the Knox County schools also are charged with the important mission of preventing drug use in schools. Notably, however, the Customs Service did not attempt to drug-test all of its employees, although they are all charged with upholding that "almost unique mission." Instead, the Service imposed a policy of testing only those employees whose access to drugs, weapons, and criminals renders the potential results of their being drug users particularly catastrophic. *Von Raab* thus provides no basis to subject all teaching candidates to drug testing.

Most relevant to the present case is the case of *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), in which the Court sustained a policy of drug-testing stu-

dent athletes. In *Vernonia*, there was evidence that student athletes had been using drugs, and were in fact the "leaders of the [school] drug culture." *See id.* at 649. No such evidence of drug use exists in the present case. Also students have "a lesser expectation of privacy than members of the population generally." *See id.* at 657. The same cannot be said of teachers.

The present case is thus distinguishable from the cases in which the Court has found exceptions to the requirement of individualized suspicion. The policy at issue is not justifiable use to safety concerns, nor due to any claim that teachers should forfeit a normal expectation of privacy. It is, in fact, very similar to the policy struck down in *Chandler*. In that case, as in this one, the officials in question were charged with important responsibilities that affected a great number of people. In that case, as in this one, drug use would interfere with the official's ability to carry out the mission of his or her position. In neither case, however, was there a time-critical safety component of the job that sufficed to override the Fourth Amendment's requirement of particularized suspicion.

What, then, justifies the Board's drug-testing policy? In *Chandler*, after distinguishing *Skinner*, *Von Raab*, and *Vernonia*, the Court made the following comment upon the justification for testing candidates for elected office:

> What is left, after close review of Georgia's scheme, is the image the State seeks to project. By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse.

In the absence of the safety considerations that were dispositive in *Skinner* and *Von Raab*, or the evidence of drug use among student athletes that was dispositive in *Vernonia*, the result reached by the panel can only be jus-

tified as a political statement that drug use by teachers is unacceptable to the Knox County Board of Education. Although such a statement is laudable, it does not constitute a justification for abridging teaching candidates' freedom from unreasonable searches.

We agree with both the panel and the Board that children must be protected from drugs, and that the schools act *in loco parentis* with respect to their pupils. It does not follow, however, that persons wishing to dedicate themselves to the education of our children must check their constitutional rights at the schoolhouse door. *See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). The lesson of *Chandler* is that, in the absence of particularized suspicion, an immediate safety concern, or evidence of a higher likelihood of drug abuse among persons with a decreased expectation of privacy, drug testing violates the Fourth Amendment. Because none of these exceptions applies to teaching candidates, *Chandler* requires that the Board's policy be held unconstitutional.

For all of the reasons stated above, we dissent from this court's denial of the Knox County Education Association's petition for *en banc* rehearing of this case.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

No. 98-1799

IN THE

Supreme Court of the United States

KNOX COUNTY EDUCATION ASSOCIATION,

Petitioner,

v.

KNOX COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Fourth Amendment prohibits post-offer, pre-employment suspicionless drug testing of new public school teachers whose profession is highly regulated and who, by state law, stand *in loco parentis* with the responsibility to protect students from harm and secure order in the schools.

2. Whether the Fourth Amendment requires a statistical nexus between student injuries and drug impaired teachers or a pronounced drug problem among a school system's teachers to justify post-offer, pre-employment drug testing of new public school teachers responsible for the safety, education and welfare of public school students subject to compulsory attendance.

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CONSTITUTIONAL, STATUTORY AND POLICY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ...

Amnd. IV.

Certain Tennessee statutes also govern this case. Those provisions are found at Code of Tennessee § 49-2-203 (powers and duties of the Board); Code of Tennessee, § 49-5-501, *et seq.* (teacher tenure); Code of Tennessee, § 49-6-4011, *et seq.* (student and employee safe environment act); Code of Tennessee, § 49-6-4201, *et seq.* (school security act); Code of Tennessee, § 49-6-4301, *et seq.* (duty to report student offenses); Code of Tennessee, § 49-6-3401 (suspension of students). These statutes are reproduced at App. 33a through 87a The Knox County Drug-Free Workplace Policy is reproduced at App. 1a through 32a.

STATEMENT OF THE CASE

Petitioners argue that the court below based its decision solely on common sense and intuitive understanding. To construe passing comments in one paragraph and one footnote of a twenty-four page opinion as bearing the weight of the Sixth Circuit's ruling defies credibility. The record evidence cited by the court and set forth below supports the Sixth Circuit's considered opinion and renders it consistent with this Court's rulings on suspicionless drug testing.

On or about June 1, 1994, the Knox County Board of Education adopted the "Drug-Free Workplace Substance Abuse Policy" for implementation in the Knox County School System. (Anderson, JA at 995). The Policy establishes a comprehensive

drug and alcohol testing program for the Board of Education's employees.[1] The first goal and objective of the Policy is "[t]o establish, promote, and maintain a safe, healthy, working and learning environment for employees and students." (JA 1005; App. 2a).

Consistent with this goal, the Policy divides the tested employees into two distinct groups: (1) those who may be tested only for reasonable suspicion of drug or alcohol impairment while at work (all employees); and (2) those who may be the subject of suspicionless testing, namely, certain "safety-sensitive" employees. Suspicionless testing may arise under three circumstances: persons hired for positions designated "safety-sensitive" are tested post-offer, pre-employment; persons transferring to safety-sensitive positions are tested pre-transfer; persons holding safety-sensitive positions are tested upon return to duty after undergoing rehabilitation. (App. 3a-4a, 9a-14a).[2] The policy does not call for random testing.

The Policy designates certain positions as "safety-sensitive" and thus subject to post-offer, pre-employment drug and alcohol testing. Those positions are principal, assistant principal, teacher, traveling teacher, teacher aide, substitute teacher, and school secretary (hereinafter, "teachers").[3] These positions are considered "safety-sensitive" by the Board because these

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1. The Federal Anti-Drug Act, 41 U.S.C. § 702, requires federal grant recipients, such as public schools, to establish a drug-free workplace.

2. Petitioners contest the post-offer, pre-employment suspicionless drug testing. Drug testing is not the only feature of the policy, however. The Policy prohibits being under the influence of an illegal drug, alcohol or a prescription drug "above the level recommended by the prescribing physician" while on duty or at a system-approved or school-related function; requires reporting convictions under any criminal drug law; provides rehabilitation; advises of disciplinary action; and contains procedures for maintaining confidentiality. (JA 1005; App. 5a-9a, 14a-21a).

3. School secretaries frequently dispense medication to students.

employees have duties where they supervise children and are responsible for their safety.[4] (Staley, JA 968-969). In the Board's view, any momentary lapse in attention or judgment on the part of these employees could result in an immediate and serious threat to a child's safety.

Any momentary lapse in teacher attentiveness is likely to result in an immediate and serious threat to a child's safety because threats to students' safety already exist in the Knox County schools. With respect to assault, in the 1992-93 school year, there were 61 assaults by students on students and 17 assaults on teachers; in 1993-94, there were 68 assaults by students on students and 9 assaults on teachers; in 1994-95, there were 44 assaults on students and 7 on teachers; in 1995-96, there were 16 aggravated assaults on students by students, 20 assaults on students, 5 assaults on principals by students and 9 assaults on teachers or teacher aides by students. (JA 1117, 1122, 1141). With respect to weapons, 1993-94 saw the greatest number of weapons at school, namely 73, of which 49 were knives. (JA 1117). In 1995-96, twenty-eight (28) weapons were recovered, 19 of which were knives. (JA 1117). With respect to drugs, in 1995-96, seventy-one (71) incidents of substance abuse by students occurred at school during the school day or at school sponsored on-campus functions, 44 of them involved marijuana. (JA 1117).

According to the Knox County Schools Chief of Security, Steve Griffin, teachers and principals are "most definitely"

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4. These employee positions were deemed "safety-sensitive" by the U.S. District Court for the Eastern District of Tennessee in its April 14, 1994, decision in the first case brought by the teachers' union challenging the drug testing policy. *See Knox County Education Association v. Knox County Board of Education*, No. 3-91-cv-72). (JA 267-292). In the first case, the trial court found the procedures wanting. Consequently, the Board revised its policy on June 1, 1994, consistent with the district court's findings and rulings. After the Board revised its policy, the teachers' union brought the instant challenge.

important to school safety and security. (Griffin, JA 937). There are 53,000 students in the Knox County School System. (Sparks, JA 855). Of those, 9,343 are special education students. There are 88 schools in the Knox County School System and only 22 full-time uniformed security officers and 4 investigators. (Griffin, JA 931-932). Thus, all schools in Knox County do not have a security officer. (Griffin, JA 932). Even in those schools where there is a uniformed officer, the majority of information concerning students' violent behavior and drug or weapon possession comes to the attention of the school security officer through the principal's or teachers' observations. (Griffin, JA 935-937; JA 1122). According to the Chief of School Security, "[i]f it weren't for the teachers we wouldn't have these reports [of student violence, drug or weapon possession] in front of us." (Griffin, JA 943; JA 1122 and 1141). Thus, teacher alertness constitutes a frontline defense for student safety.

The testimony of Ms. Betty Sue Sparks, the Human Resources Director for Knox County Schools and a former principal, teacher and special education teacher at elementary, middle and high school, shows that teacher alertness is key not only to student safety but also to a positive school experience. (Sparks, JA 812-814; 871-877). Consider a typical elementary school day as described by Mr. Sparks. According to Ms. Sparks, teachers have bus, cafeteria and recess duty. Teachers present lessons, monitor group activities, take students to the rest room, monitor their breaks, and take students to the library. Afternoon activities include more lessons or special activities. Teachers monitor students on specific behavior contracts and often fill out daily reports for parents about their children's behavior. Teachers are expected to give positive reinforcement to the children as well as discipline. (Sparks, JA 872-877). The overall responsibility of the teacher is to ensure that students with whom the teacher is entrusted have a safe, positive, meaningful school experience. (Sparks, JA 878). Drug and weapon detection — with respect to student possession — is also one of the responsibilities of the Knox County teachers. (Sparks, JA 890).

For these reasons, it is "important to have a sober, functioning teacher in every classroom, doing the best he or she can do for the children." (Sparks, JA 878).

Knox County tests for drugs that impair teachers' thoughts and reactions in the classroom. (Sparks, JA 909-910). With respect to the teaching of children, Ms. Sparks stated: ". . . I have found that it is vitally important for me to be on my toes every minute with every youngster that I am working with." (Sparks, JA 987). The emotional and physical health and well-being of the students is of paramount concern. (Sparks, JA 908).

Underlining the importance of teacher alertness, Ms. Henrietta Grant, a Knox County principal of a 763-student high school, the smallest high school in the county, described the hallways in her high school when all the students are changing classes as a "mad house." (Grant, JA 948-950). Ms. Grant pointed out that in high school teachers monitor the halls during class changes and monitor the cafeteria while some 300 students are eating lunch. (Grant, JA 948-950).

The typical day of a high school teacher is no less hectic than that of an elementary school teacher. High school teachers teach three ninety-minute periods and monitor the halls, the cafeteria and student assemblies. (Grant, JA 952-953). When asked about teacher and principal responsibilities, Ms. Grant said

> I think they're responsible for everything. I think that you're responsible for the students' well-being, you're responsible for their learning, you're responsible for them getting off the bus or however they get to school, you're responsible while they're there, you're responsible to see that they leave the school safely. And I think you're responsible for the students the entire time they're in the building. And outside the building, I might add.

(Grant, JA 953-954). More poignantly, when asked for the reasons why Knox County Schools needs a drug-free workplace policy that includes teacher testing, Ms. Grant said

> I think that my kids are the most important things in our lives, and that we should be as clear-headed as we can be when we're working with those students. I think that we're responsible for them. And I don't feel that the teachers, anybody who works in the school should not be clear-headed and clear-thinking when they're working with them.

(Grant, JA 953-954). When asked why clear-headedness is important for teachers and principals, Ms. Grant said

> [w]ell, many reasons. Safety: I would not want a person working with a child whose reaction time had been . . . thrown off with a substance. I think that it's true that you react differently when you're clear-headed as opposed to when you're not clear-headed, and I would hope that all of my teachers would be able to act as quickly and as . . . they'd be able to act in such a manner that would protect the children if that were called for.
>
> . . .
>
> You know, I just want my folk to be as clear-headed as they can be. Children are smarter than we are, they out-think us, and it seems to me that we have to be careful about being competent enough to work with them. They're just smarter than we are, they're thinking all the time. At the best you can do it's hard to keep up with them.

(Grant, JA 954-955).

During the school year, children spend the major part of their waking hours at school. (Grant, JA 955). Echoing the

testimony of Ms. Grant, the District Court took judicial notice that children are our most important asset and that teaching children is important. (JA 956). In fact, the District Court noticed that "[t]he most important thing in the world is getting our children educated." (JA 956). With respect to the importance of teachers, Ms. Grant testified that teachers are "**the**" role models for children. (Grant, JA 957). Finally, when asked if even a momentary lapse of attention on the part of a teacher could have serious, if not disastrous, tragic consequences for a student, Ms. Grant answered: "Without a doubt." (Grant, JA 958-959).

The potential for tragic consequences at school was also highlighted during the testimony of Mr. Anderson, the chairman of the Knox County Board of Education at the time the Board adopted the 1994 Policy and a former elementary and high school teacher. (Anderson, JA 994-998). Describing a time when he prevented a fatal knifing, Mr. Anderson said

> . . . when I was a teacher, I taught at Austin-East High School, I was on bus duty. And a lot of times in schools, you have less structured situations; bus duty, lunch duty, chaperoned dances, trips. Well, there was a bus came in, we were on split campuses and a bus came in. There was something going on on the bus and a child got off the bus and told me there was a fight going on. I got on the bus, and as I was working my way back to the middle of the bus where the fight was going on I saw one young man pull a knife and draw back to stab another young man.
>
> I grabbed the guy, he didn't see it, and pulled him back, and the knife caught the kid right below his heart, in the side, and punctured him there. If I had been delayed one second or been one-tenth of a second slow reacting, he probably would've been stabbed in the heart.

> And that, as always, I think about it every time we have an opportunity to make sure that everybody's alert, that everybody's judgment's not impaired. And it's very important, I just think it's very important for that reason.

(Anderson, JA 996-997). With respect to momentary lapses of attention, Mr. Anderson said

> [o]h, I think momentary lapses are more important than — the most important situation. Because things happen so fast when you put seven hundred teenagers in a school, you know, everyone together, from all parts of the County.

(Anderson, JA 997). As Mr. Anderson concluded, in light of the total school experience, ". . . a lot of things happen in schools." (Anderson, JA 998).

Research indicates that twenty-five percent (25%) of the population uses dangerous drugs and that many have used drugs on the job. (JA 812, 1309). With respect to the teaching profession in particular, the District Court took judicial notice that teachers are no different than any other profession. (JA 859, 879-880). Likewise, Ms. Sparks, the Human Resources Director, testified that she had no indication to believe that teachers are any different than any other workplace or profession in our society today. (Sparks, JA 880).

To ensure privacy, confidentiality, integrity and reliability, the Policy establishes a testing protocol, appoints a physician as the Medical Review Officer, assures confidentiality, and incorporates the procedures set forth in the Medical Review Officer Manual published by the National Institute on Drug Abuse, U.S. Department of Health and Human Services. (JA 1005; App. 17a-30a). The Policy requires that the laboratory collecting the urine specimens and performing the tests do so in accordance with applicable federal Department of

Transportation procedures to insure privacy, integrity, validity and reliability. To ensure privacy, the Policy provides for non-observance collection, unless otherwise warranted by specified scientific findings concerning a specific sample. The drug testing protocol requires the Enzyme-Multiplied Immunoassay Technique (EMIT) screen to be followed by the gas chromatography/mass spectrometry (GC/MS) technique for those specimens identified as positive under the EMIT screen. (JA 1005; App. 21a). The Policy provides for the confidentiality of results and sets out specific confidential procedures for the communication and retention of said results, separate from the employee's personnel file.[5] (JA 1005; App. 17a-30a).

Recognizing the privacy interests of the employees, the Policy contains strict requirements with regard to confidentiality. (JA 1014). The Policy protects the confidentiality of the drug testing results which

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5. The Policy also provides for alcohol testing. Under the written Policy, the alcohol testing procedure involves the administering of a breath analysis test by the Sheriff's Department, followed by an alcohol urine assay EMIT screen followed by a confirmatory gas chromatography test on positive screens. The breath test is positive at .02; the EMIT and GC/MS tests are positive at .04. Like the drug testing procedures, the alcohol testing procedures follow the same privacy and confidentiality protocol. (JA 1018-1019). Trial testimony revealed that the Sheriff's Department no longer operates the Breathalyzer test for the Knox County School System. In practice, in cases of reasonable suspicion, school security officers, employed by the Board and certified to operate the Breathalyzer, operate the school system's own Breathalyzer. The School Security Office is not located in the Sheriff's Department. (Griffin, JA 1018-1019). Under the Policy, those results are then conveyed to the Director of Personnel who, at that point, follows the procedure for obtaining a urine specimen. (JA 1014). The Sixth Circuit remanded the alcohol testing procedure to the District Court to determine whether the blood alcohol level of .02 is reasonably related to the purpose of the testing. 158 F.3d at 386. The Board does not appeal this ruling.

> will be released by the MRO and the Director of Personnel only upon the written consent of the individual, except the results may be released and relied upon by the Knox County Board of Education in any administrative or court action by the employee involving the drug test, or any discipline resulting from a violation of this policy, including employment and court proceedings.

(JA 1016-1017). The Policy requires the MRO to maintain the substance screens in a secure manner and to disclose the results to the Director of Personnel only to the extent necessary to address any work-related safety risks occasioned by either the drug or alcohol use. (JA 1014). The MRO reports to the Personnel Director as follows: if the test is negative, he reports a negative; if the test is positive for an illegal drug, the MRO identifies the drug; if the test result is positive for a prescription drug and the employee has no prescription, the MRO identifies the drug; if, however, the test result is positive for a prescription drug within prescription level ranges and the employee satisfies the MRO that he has a valid prescription, the MRO tells the Director of Personnel only that the employee had a prescription drug but does not identify the drug; in this latter case, the employee is actually considered "negative." (JA 1016). If substance screening shows a confirmed positive result for which there is no current physician's prescription, the MRO may request a second confirming test on that specimen. (JA 1016).

In the case of post-offer, pre-employment testing for new teachers, applicants are given a copy of the Policy in advance of the physical. Applicants sign an acknowledgment of its purpose prior to substance screening and consent to the summary result being transmitted to the MRO and, if the MRO deems necessary under the terms of the policy, to the Director of Personnel. An applicant refusing to complete any part of the drug testing procedure will not be considered a valid candidate for employment and the refusal is deemed a withdrawal of the

individual's application. The applicant may reapply after one year and show proof of successful rehabilitation. (JA 1007, 1019).[6]

REASONS FOR DENYING THE WRIT

I.

THE FOURTH AMENDMENT DOES NOT PROHIBIT POST-OFFER, PRE-EMPLOYMENT SUSPICIONLESS DRUG-TESTING OF NEW PUBLIC SCHOOL TEACHERS WHOSE PROFESSION IS HIGHLY REGULATED AND WHO, BY STATE LAW, STAND IN LOCO PARENTIS WITH THE RESPONSIBILITY TO PROTECT STUDENTS FROM HARM AND SECURE ORDER IN THE SCHOOLS.

The Sixth Circuit correctly held that the Knox County public school system's post-offer, pre-employment suspicionless drug testing of new teachers does not violate the Fourth Amendment. 158 F.3d 361.[7] Teachers in the Knox County public

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6. With respect to discipline of current employees found under the influence of drugs or alcohol pursuant to reasonable suspicion testing, the policy states that "[e]mployees in violation of the provisions of this Policy will be subject to disciplinary action up to and including termination." (JA 1013). Any disciplinary action must be carried out in accordance with the due process requirements of Board Policy, state law, and the Charters for Knox County, Tennessee, and the City of Knoxville, where applicable. (JA 1021-1022). Petitioners do not challenge the reasonable suspicion testing.

7. As the Sixth Circuit analyzed:

> [i]t is now well-settled that drug testing which utilizes urinalysis is a "search" that falls within the ambit of the Fourth Amendment. *See, e.g., Skinner*, 489 U.S. at 617, 109 S. Ct. 1402 (the collection and testing of urine intrudes upon expectations of privacy in such a way "that these

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school system, by virtue of their legal obligation *in loco parentis* and their state statutory obligations to protect the safety and welfare of their students, hold "safety-sensitive" positions that justify suspicionless post-offer, pre-employment (not random) drug testing. By virtue of certain student conduct, threats to student safety exist in the Knox County school system and teachers must be alert to those threats. In upholding the Knox County Schools' suspicionless post-offer, pre-employment drug testing of teachers, the Sixth Circuit correctly interpreted this Court's rulings in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *Vernonia School Dist. 475 v. Acton*, 515 U.S. 656 (1995) and *Chandler v. Miller*, 520 U.S. 305 (1997).

Because it is well-settled that urinalysis drug-testing is a "search" within the meaning of the Fourth Amendment, "it is necessary to balance the individual's privacy expectations against the Government's interest. . . ." *Von Raab*, 489 U.S. at 665. Thus, as this Court directed in *Skinner*; *Von Raab*; *Vernonia* and *Chandler*, the threshold inquiry is whether the Knox County Board of Education has a legitimate governmental interest in

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> intrusions must be deemed searches under the Fourth Amendment.").

158 F.3d at 371. However,

> the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable . . . *Skinner*, 489 U.S. at 619, 109 S. Ct. 1402 (cites omitted). The reasonableness of a search "depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337-342, 105 S. Ct. 733, 740-743, 83 L. Ed. 2d 720 (1985)).

158 F.3d at 371.

controlling the use of drugs by teachers in the workplace. The follow-up inquiry is whether the Board's policy balances the teacher's privacy expectations[8] against that governmental interest.

Inasmuch as the law is well-settled on this issue, and inasmuch as the Sixth Circuit has correctly applied this Court's rulings, further guidance on this subject is not necessary. The instant case is not one for which certiorari is warranted, especially in view of the fact that the duties of public school teachers are governed by state, not federal, law. This Court has recently denied certiorari in two student drug testing cases. *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *cert. den.*, 119 S. Ct. 68 (1999); *Willis v. Anderson Community School Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. den.*, 119 S. Ct. 1254 (1999). The Board urges this court to do likewise in the instant case.

A. The Knox County Public Schools Have A Legitimate Governmental Interest In Employing Drug-Free Teachers.

The Sixth Circuit correctly found that there are

> few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators.

158 F.3d at 375. This government interest is shared by the community:

> Concomitant with this governmental interest is the community's interest in reasonably insuring that those who are entrusted with the care of our children will not be inclined to influence children — either directly or by example — in the direction of illegal

8. Teachers do not challenge the protocol in their petition.

> and dangerous activities which undermine values which parents attempt to instill in children in the home. Indeed, teachers occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child, with the potential for both good and bad. Teachers and administrators are not simply role models for children (although we would certainly hope they would be that). Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values of children. Teachers and administrators are not some distant societal role models, as in the case of the Georgia political candidates in *Chandler*; rather, on a daily basis, there is a direct nexus between the jobs of teachers and administrators and the influence they exert upon the children who are in their charge. Indeed, directly influencing children is their job.

158 F.3d 361. Tennessee law recognizes this role and imposes certain statutory duties on public school systems and teachers.

1. *By state law, Knox County teachers act in loco parentis and are responsible for the safety of public school students subject to compulsory attendance.*

The Sixth Circuit correctly affirmed the Board's assessment of Knox County Schools as no longer carefree[9] and recognized

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9. Referring to the recent tragic schoolyard shootings in Jonesboro, Arkansas and Springfield, Oregon, the Sixth Circuit observed,

> [i]ndeed we do not have to search beyond recent local and national media headlines to understand that schools are, unfortunately, too often turned into places in which children are subjected to grave and even life-threatening dangers where the split-second vigilance of teachers and

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the teachers' statutory duty to protect the students committed to its care. (JA 1117, 1122, 1141). In 1981, the State of Tennessee enacted the School Security Act which recognized

> the **position of the schools *in loco parentis* and the responsibility** this places on principals and teachers within each school **to secure order and to protect students from harm while in their custody.** (emphasis added).

Code of Tennessee, § 49-6-4203(b).[10] In that Act, the Tennessee General Assembly expressed its intent "to secure a safe environment in which the education of the students of Tennessee may occur."[11] Code of Tennessee, § 49-6-4203(a). At that time,

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> administrators, and the need for clear-headed thinking, is absolutely critical to the safety of the school children.

158 F.3d at 378-379 at 23. More tragically, respondent now adds Paducah, Kentucky, Littleton, Colorado and Conyers, Georgia to this list.

10. This Court has

> acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 684, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," *Id.*, at 681, 92 L. Ed. 2d 549, 106 S. Ct. 3159 (internal quotation marks omitted.)

Veronia, 515 U.S. at 655.

11. This Court has held the right to attend a public school is a state-created, rather than a fundamental, federal constitutional right. *See San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973); *Plyler v. Doe*, 457 U.S. 202, 221 (1982). For the most part, public schools are state and local community undertakings. Thus, the State of Tennessee regulates and controls public education, consistent

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the General Assembly found "a rising level of violent activity and use of drugs is occurring in some public schools . . ." and that "removal of dangerous weapons, drug paraphernalia and drugs from school property is necessary to lessen hazards to students . . ."[12] such that "searches of students themselves may be necessary to protect the larger student body, ..." because "[t]he presence on school property of students with drugs in their bodies may pose a threat to the safety and well-being of that student and other students. . . ."[13] § 49-6-4203(d)(e)(1)(2)(4). Respecting the need for local community control, the Act states

> [i]ndividual circumstances and local particularities require that individual principals must be relied on to exercise their professionally trained judgments

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with the requirements of receiving certain federal financial assistance. The Tennessee Constitution recognizes the inherent value of education and requires the General Assembly to provide the maintenance and support of a system of free public schools. Tenn. Const. Art. XI, § 12. As a result, public education in the State of Tennessee is a highly regulated state industry. Code of Tennessee § 49-1-101, *et seq.* through § 49-50-1401, *et seq.* State law requires compulsory attendance for children between the ages of seven and seventeen, inclusive. Code of Tennessee § 49-6-3001(c)(1); regulates curriculum and report cards. § 49-6-1001, *et seq.*, § 49-6-1201, *et seq.*, § 49-6-1301 and § 49-6-901; directs the implementation of drug abuse resistance education, § 49-1-402, *et seq.*; provides for school safety and security, § 49-1-214 and § 49-6-4201, *et seq.*; regulates school discipline, § 49-6-4011, *et seq.* and § 49-6-4101; and governs teacher tenure, dismissal and suspension. § 49-5-501, *et seq.* Absent discrimination, the privilege to teach in the public schools is governed by state law. § 49-5-501, *et seq.* *See, e.g.*, 42 U.S.C. § 2000e, *et seq.*; 29 U.S.C. § 621, *et seq.*; 42 U.S.C. § 12101, *et seq.* Petitioner teachers do not allege discrimination in the instant case.

12. The Tennessee legislature saw fit to take these steps in 1981; subsequent events only further support these findings.

13. By analogy, the presence of teachers with drugs in their bodies pose a similar threat.

> in determining what action is appropriate within the provisions of this part; . . . .

§ 49-6-4203(e)(3).[14] Acknowledging that teachers are the first observers of student misconduct, the Act provides that a student may be searched as a result of "information received from a teacher . . ." if such action is reasonable to the principal. § 49-6-4205(a).[15]

The Tennessee General Assembly delegated its power to "provide for the maintenance, support and eligibility standards of a system of free public schools" to local "board[s] of education elected by the people." Code of Tennessee, § 49-2-201, *et seq.*; Tenn. Const. Art. XI, § 12. The Board has the duty to employ teachers eligible for tenure.[16] § 49-2-203(a)(1). Under Tennessee law, new teachers or teachers new to a system serve a three year probationary period before acquiring tenure. § 49-5-504. Even after attaining tenure, a teacher may be dismissed by the Board for "incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination. . . ." as defined under state law. §§ 49-2-203(a)(7) and 49-5-511(a)(1)(2).[17] Unprofessional

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14. In 1988, the Act was amended to allow drug testing of students upon "reasonable indications." § 49-6-4213. In 1989, students were prohibited from carrying electronic pagers. § 49-6-4214. In 1994, the search of students and student lockers was broadened for weapons and drugs. §§ 49-6-4204 and 4205.

15. By 1996, the General Assembly recommended a zero tolerance policy toward any student who engages in behavior involving drugs, weapons or violence on school property. § 49-6-4216(b). The Knox County Board of Education has adopted such a policy.

16. Subject to state approval, the local board of education has the authority to set standards of employment over and above those required by the state board of education. § 49-5-506.

17. Dismissal or suspension of a tenured teacher requires an extensive fair hearing process and allows judicial review and appeal. §§ 49-5-511, 512, 513.

conduct or "conduct unbecoming to a member of the teaching profession" includes "improper use of narcotics or intoxicants." § 49-5-501(3)(E). By state law, neither a new teacher on probation nor a tenured teacher have an expectation of employment or continued employment if improperly using narcotics or intoxicants.

Under Tennessee law, public school teachers have statutory duties and responsibilities *in loco parentis* to protect the safety of students compelled to attend school. § 49-6-4203(b). Like the railroad employees in *Skinner*, for teachers monitoring students "even a momentary lapse in attention could have disastrous consequences." *Skinner*, 489 U.S. at 628. Like the customs service agents in *Von Raab*, teachers have the statutory responsibility to report student drug and weapon offenses and should have unimpeachable integrity and judgment. § 49-6-4105(a). Like the athletes in *Vernonia*, teachers "go out for the team," expecting their conduct to be scrutinized. § 49-5-501, 511, 512, 153. Unlike the Georgia political candidates in *Chandler*, teachers are not some distant societal role models, but rather,

> on a daily basis, **there is a direct nexus between the jobs of teachers . . . and the influence they exert upon the children who are in their charge**. (emphasis added).

158 F.3d at 375. As the Sixth Circuit correctly observed, "[i]ndeed, directly influencing children is their job." 158 F.3d at 375. In *Vernonia*, this Court recognized the special responsibility of the schools to care for and direct students, stating that

> deterring drug use by our Nation's school children is at least as important as enhancing efficient enforcement of the Nation's law against the importation of drugs, which was the governmental concern in *Von Raab* . . . or deterring drug use by

> engineers and trainmen, which was the governmental concern in *Skinner*. . . . Moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.

515 U.S. at 661. In view of the schools' special responsibility, it is legitimate that Knox County test the new teachers who will be teaching and influencing its school children. Further, the testing of new teachers comes at an early time in the employment relationship when the school system knows very little about the new teacher. Given these considerations, Knox County has a legitimate interest in employing drug free teachers. To paraphrase this Court in *Von Raab*, the community should not bear the risk that new teachers with impaired perception and judgment will be caring for school children who are, by state law, compelled to attend school.[18] 489 U.S. at 671.

2. *Knox County teachers hold "safety-sensitive" positions.*

Not only does Tennessee law place public school teachers in safety-sensitive positions, but the record evidence shows that Knox County teachers hold, in fact, safety-sensitive positions as that term is understood in the context of drug-testing. Under *Skinner*, the test for whether employees hold safety sensitive

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18. *See also Strong v. Uniondale Union Free School Dist.*, 902 F.2d 208, 212 (2nd Cir. 1990) (school district can require tenured teacher to provide medical records relevant to her month-long absence because district has a strong interest in safeguarding the health and welfare of the students in a teacher's class); *Daury v. Smith*, 842 F.2d 9 (1st Cir. 1988) (recognized a legitimate public interest in providing a safe and healthy educational environment for students in requiring a principal, alleged to have put a "strangle-hold" on a student, to submit to a psychiatric examination); *Lyons v. Sullivan*, 602 F.2d 7 (1st Cir.), *cert. den.*, 444 U.S. 876 (1979) (no constitutional infirmity in requiring tenured teacher to place himself in the care of a psychiatrist as a condition of his continued employment).

positions is whether the employees discharge duties such that "even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628.[19]

The testimony of Knox County teachers and principals revealed the myriad of duties and tasks they must discharge in a typical school day with respect to the children in their care, from classroom teaching to bus and cafeteria duty to recess. (Sparks, JA 812-814, 871-878; Grant, JA 958-959; Anderson, JA 004-998). Vested with these duties of caring for children and teenagers, teachers are safety-sensitive because "even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628. Anderson's testimony of how his alert response saved the life of a student on the bus is but one example of why even a momentary lapse of attention on the part of a teacher can have disastrous consequences for a student. (Anderson, JA 996-997). For this reason, teachers' perceptions and judgments must not be impaired.

Acknowledging the unique role of teachers, the Sixth Circuit correctly stated,

> [j]ust as the Customs agents in *Von Raab* must be considered in their own unique context, so too must the nature of the work and positions of school teachers and administrators be viewed as unique.

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19. As the Sixth Circuit noted, positions other than railroad engineers and customs agents have been found safety-sensitive: nuclear power plant workers, seamen operating oil tankers, a meter repairman for a gas company, a firefighter and emergency medical technician, a process technician at a petro-refining facility, police officers, a bus driver, pipeline operators, airline industry personnel, correctional officers in regular contact with inmates, Army civilian guards, civilian workers in Army chemical weapons plant, mass transit workers. 158 F.3d at 377-378, n.14 through 21. (citations omitted) *See also Carelli v. Ginsburg*, 956 F.2d 598 (6th Cir. 1992) (upheld drug testing of thoroughbred horse trainers).

158 F.2d at 374. The record evidence reflects that teachers in the Knox County Schools are the "frontline" of school security and first-hand observers of student substance abuse and weapon possession. (Griffin, JA 935-943). In 1996, there were 71 documented occurrences of student substance abuse and 28 recovered weapons. In 1993-94, there were 73 recovered weapons. (JA 1117). As the Chief of Security testified, ("[i]f it weren't for the teachers we wouldn't have these reports in front of us."). (Griffin, JA 943). Thus, in approving the post-offer, pre-employment drug test for new teachers, the Sixth Circuit rightly concluded

> the suspicionless testing regime is justified by the unique role [teachers] play in the lives of school children and the *in loco parentis* obligations imposed upon them.

158 F.3d at 375.

II.

THE FOURTH AMENDMENT DOES NOT REQUIRE A STATISTICAL NEXUS BETWEEN STUDENT INJURIES AND DRUG IMPAIRED TEACHERS OR A PRONOUNCED DRUG PROBLEM AMONG A PUBLIC SCHOOL SYSTEM'S TEACHERS TO JUSTIFY POST-OFFER, PRE-EMPLOYMENT DRUG TESTING OF NEW TEACHERS RESPONSIBLE FOR THE SAFETY AND EDUCATION OF STUDENTS SUBJECT TO COMPULSORY ATTENDANCE.

Petitioners, not the Sixth Circuit, misapprehend this Court's "teachings" (Pet. 22) with respect to the kind of nexus that must be shown to justify drug testing. Petitioners believe that in order to show a "special need" to justify suspicionless drug testing, the Board must demonstrate a problem of drug abuse among its teachers or offer evidence that an impaired teacher allowed harm to befall the students. Petition at 15. In *Von Raab*, this Court

rejected a nexus approach requiring empirical evidence. 489 U.S. at 673-674. Finding unpersuasive the customs agents' contentions that the drug testing program was unjustified because it was not based on "any perceived drug problem among Customs employees" and did not reveal "a significant number of drug users" (no more than 5 employees out of 3,600 tested positive for drugs), this Court stated: "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." 489 U.S. at 674-75. Focusing on the harm to be avoided rather than statistics, this Court concluded:

> [w]here, as here, the possible harm against which the government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

Von Raab, 489 U.S. at 674-5. Again, in *Chandler*, this Court acknowledged that a demonstrated problem of drug abuse is "not in all cases necessary to the validity of a testing regime. . . ." 520 U.S. at 319. Although this Court indicated that such a demonstrated drug problem would "shore up an assertion of special need for a suspicionless general search program," *Id.*, this Court did not hold that a demonstrated drug problem among a particular employee group is the only method by which the government can justify its assertion of special need to test new safety-sensitive employees. Rather, the nexus requirement is met if "the possible harm against which the government seeks to guard is substantial." *Von Raab*, 489 U.S. at 674-675. As this Court stated, "[t]he need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." *Id.*

In the case of Knox County teachers, this Court's rulings do not require the Board to "shore up" its assertion of special need to drug test new teachers acting *in loco parentis*. To the

contrary, the nexus this Court requires is satisfied because the state statutes imposing the duty to protect and the record evidence shows that the possible harm to be avoided is substantial. Thus, the Sixth Circuit correctly found that the Board demonstrated "a clear, direct nexus . . . between the nature of the employee's duty and the nature of the feared violation." 158 F.3d at 378, citing *Harmon v. Thornburgh*, 878 F.2d 484, 490 (D.C. Cir. 1989), *cert. den. sub. nom., Bell v. Thornburgh*, 493 U.S. 1056 (1990). The record evidence and the Tennessee statutes clarify the duties and responsibilities of teachers to protect students from harm and report student offenses. The record evidence shows the nature of the feared violation of that duty, namely, harm to students and undetected weapons and drugs. (Sparks, JA 812-814, 871-878; Grant, JA 948-959; Anderson, JA 994-998; and Griffin, JA 931-943). The record evidence shows that teachers are assigned bus, cafeteria and recess duties to protect students from harm. If teachers are not alert, students can be knifed on buses, (Anderson, JA 994-998), or possess weapons or drugs undetected. (Griffin, JA 931-943). As this Court said in *Von Raab*, "[t]he need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal." 489 U.S. at 674-675. The possible harm to school children, subject to compulsory attendance, from drug-impaired teachers amply justifies the Board's policy of drug testing new teachers.

Empirical evidence of drug use or drug abuse among Knox County teachers is not necessary under *Von Raab* or *Chandler* in order to justify post-offer, pre-employment drug screening of new teachers. The safety-sensitive nature of the tasks which the teachers perform in a highly regulated state industry justifies such screening. Tennessee law is heavily focused on the safety and security of the public school environment for the protection of the students who compulsorily attend. Required by federal law to have a drug free workplace policy and by state law to provide a safe and secure school environment, and aware of the events which have occurred in its school system that require

teachers to be alert for the safety of its students, Knox County has elected to screen new teachers before entrusting to them the care of school children. Taking these matters into account, the Sixth Circuit based its decision on the record evidence and correctly followed the rulings of this Court in approving the suspicionless post-offer, pre-employment drug testing of new teachers in Knox County, Tennessee.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — KNOX COUNTY BOARD OF EDUCATION'S DRUG-FREE WORKPLACE SUBSTANCE ABUSE POLICY

KNOX COUNTY BOARD OF EDUCATION'S DRUG-FREE WORKPLACE SUBSTANCE ABUSE POLICY

For Reference Only

Drug-Free Workplace Substance Abuse Policy

Section 30[illegible]1.00

.01 ***Purposes***

1. The Knox County Board of Education is committed to a safe working environment, to making adequate provisions for the safety and health of its employees at their place of employment, and to the safety and health of the students we serve as well as the general public. The Knox County Board of Education regards its personnel as individuals as well as employees. Therefore, the Board believes that alcoholism and drug addiction are illnesses and should be treated as such. The Board further believes that employees who develop alcoholism or other drug addictions can be helped to recover and should be offered appropriate assistance. It is in the best interest of the employee and the board that when alcoholism or drug addiction is present, it should be diagnosed and treated at the earliest possible date. Confidential treatment of the diagnosis and recovery process for alcoholism or drug addiction is essential.

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2. The Knox County Board of Education recognizes that substance abuse in our nation and our community exacts staggering costs in both human and economic terms. Substance abuse can be reasonably expected to produce impaired job performance, lost productivity, absenteeism, accidents, wasted materials, lowered morale, rising health care costs, and diminished interpersonal relationship skills. The Knox County Board of Education and its employees share a commitment to create and maintain a drug-free workplace.

3. The Knox County Board of Education is responsible for the instruction and well-being of the students entrusted to its care. A consistent message needs to be communicated by the Board that the use of illegal drugs, the abuse of alcohol, and the misuse of prescription drugs are unacceptable.

4. Provisions of the Federal Anti-Drug Act, 41 U.S.C.A. § 702, require federal grant recipients to establish a drug-free workplace. Employees must be provided with a statement notifying them of the prohibitions pertaining to controlled substances, consequences of violations, and compliance with the drug-free policy as a condition of employment. Employers must inform employees of drug-free requirements through an awareness program.

.02 ***Policy Goals and Objectives***

1. To establish, promote, and maintain a safe, healthy, working and learning environment for employees and students.

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2. To aid the affected employee in locating a rehabilitation program for employees with a self-admitted or detected substance abuse problem.

3. To promote the reputation of the Knox County School System and its employees as responsible citizens of public trust and employment.

4. To eliminate substance abuse problems in the workplace.

5. To aid in the reduction of absenteeism, tardiness, and apathetic job performance.

6. To provide a clear standard of job performance for Knox County Schools employees.

7. To provide a consistent model of substance-free behavior for students.

.03 ***Pre-Employment Testing***

In the furtherance of achieving the Knox County Board of Education's goals and objectives as enumerated above, all applicants being considered for employment positions identified by the Knox County Board of Education as being safety-sensitive will be required to submit to a urinalysis test for the detection of the illegal use of drugs, as part of the currently required post-offer, pre-employment physical. Applicants for positions which require testing will be given a copy of this policy in advance of the post-offer, pre-employment physical.

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Applicants will acknowledge having read or had this policy explained to them and should understand that as a condition of employment they are subject to its contents. Applicants will sign an acknowledgement prior to substance screening, permitting the summary result to be transmitted to the Medical Review Officer and the Director of Personnel. An applicant refusing to complete any part of the drug testing procedure will not be considered a valid candidate for employment with the Knox County Board of Education and such will be considered as a withdrawal of the individual's application for employment. The applicant will not be permitted to re-apply for employment with the Knox County Board of Education for at least twelve (12) months and not until the applicant shows proof of successful completion of a drug rehabilitation program or proof that the applicant has otherwise rehabilitated successfully and is no longer engaging in illegal drug use.

If substance screening shows a confirmed positive result for which there is no current physician's prescription, a second confirming test may be requested by the MRO. If the first or any requested second confirming test is positive, any job offer will be revoked.

The Knox County Board of Education has several positions which are considered safety sensitive. In general, these are positions where a single mistake by such employee can create an immediate threat of serious harm to students and fellow employees.

Safety-sensitive positions requiring post-offer, pre-employment drug testing are: principal, assistant principal,

teacher, traveling teacher, teacher aide, substitute teacher, school secretary, and school bus driver. The procedure for testing these positions is contained in Section 3011.11 of this Policy. Individuals applying for other positions shall not be required to submit to a post-offer, pre-employment substance screen.

.04 *Employee Conduct*

Substance abuse is the misuse or illicit use of alcohol, drugs, or controlled substances, including marijuana, heroin, or cocaine.

1. Illegal drugs

Drug abuse by employees interferes with the educational and work process, and compromises the safety, productivity, and well-being of staff and students. Employees are expected to conduct themselves in a manner consistent with the following provisions:

(1) Employees shall not engage in the illegal use of drugs at any time and such use will not be tolerated. Further, employees on duty, or on Knox County Board of Education property, or in attendance at system-approved or school-related functions will not manufacture, distribute, dispense, possess or use illegal drugs or drug paraphernalia, nor will they be under the influence of such drugs.

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(2) An employee convicted of any criminal drug law shall notify the Knox County Schools Director of Personnel no later than five (5) days after such conviction. Within thirty (30) days after receiving notice of a conviction, Knox County Schools will take appropriate disciplinary action and/or refer the employee to an appropriate substance abuse rehabilitation program.

(3) Failure of the employee to report the conviction within the time prescribed will lead to disciplinary action up to and including discharge. Convictions of a criminal drug law can result in disciplinary action up to and including discharge. In determining whether and to what extent an employee will be disciplined or discharged for the conviction of a criminal drug law, the Board will consider the following factors: the degree to which the nature of the criminal offense reduces the Knox County Board of Education's ability to maintain a safe working environment; the degree to which the nature of the criminal offense unreasonably endangers the safety of other employees and/or students; the degree to which the conviction unreasonably undermines the public confidence in the Knox County Board of Education's operations; the nature of the criminal offense; the nature of the employee's job with the Knox County Board of Education; the existence of any explanatory or mitigating facts or circumstances; whether the employee promptly reports the conviction; and any other facts

relevant to the employee, including but not limited to years to service and record of performance with the Knox County Board of Education.

2. Alcohol and Drugs

Alcohol, prescription and over-the-counter drugs are legal and readily available. These drugs, when abused over time or used in combination with one another, can result in chemical dependency or poly-drug addiction. Employees are expected to conduct themselves in a manner consistent with the following provisions:

(1) Employees on duty, or on Knox County Board of Education property, or in attendance at system-approved or school-related functions will not be under any degree of intoxication or odor from alcohol. Employees will not manufacture, sell, or use alcoholic beverages or possess open alcoholic beverage containers while on duty, or on Knox County Board of Education property, or in attendance at system approved or school related functions.

(2) Employees on duty will not use or take prescription drugs above the level recommended by the prescribing physician, and will not use prescribed drugs for purposes other than those for which they are intended. Employees will not distribute or dispense such drugs except as provided in Board Policy 6008.05, Part 3.

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(3) An employee convicted of any criminal drug law involving the use of alcohol, prescription or over-the-counter drugs shall notify the Knox County Schools Director of Personnel no later than (5) days after such conviction. Within thirty (30) days after receiving notice of a conviction, Knox County Schools will take appropriate disciplinary action and/or refer the employee to an appropriate substance abuse rehabilitation program.

(4) Failure of the employee to report the conviction within the time prescribed will lead to disciplinary action up to and including discharge. Convictions of a criminal drug law involving the use of alcohol, prescription or over-the-counter drugs can result in disciplinary action up to and including discharge. In determining whether and to what extent an employee will be disciplined or discharged for the conviction of a criminal drug law involving the use of alcohol, prescription or over-the-counter drugs, the Board will consider the following factors: the degree to which the nature of the criminal offense reduces the Knox County Board of Education's ability to maintain a safe working environment; the degree to which the nature of the criminal offense unreasonably endangers the safety of other employees and/or students; the degree to which the conviction unreasonably undermines the public confidence in the Knox County Board of Education's operations; the nature of the criminal offense; the

nature of the employee's job with the Knox County Board of Education; the existence of any explanatory or mitigating facts or circumstances; whether the employee promptly reports the conviction; and any other facts relevant to the employee, including but not limited to years to service and record of performance with the Knox County Board of Education.

.05 Physical examination/screening based upon reasonable suspicion.

Whenever the Knox County Board of Education, through its Director of Personnel or the person authorized to act as the Director in the Director's absence, and/or the Medical Review Officer, reasonably suspects that an employee's work performance or on-the-job behavior may have been affected in any way by illegal drugs or alcohol, or that an employee has otherwise violated the Knox County Board of Education Drug-Free Workplace Substance Abuse Policy, the employee may be required to submit a breath and/or urine sample for drug and alcohol testing. When a supervisor observes or is notified of behaviors or events that lead the supervisor to believe that the employee is in violation of the Drug-Free Workplace Substance Abuse Policy, the Supervisor should notify the Director of Personnel.

An employee who is required to submit to drug/alcohol testing based upon reasonable suspicion and refuses will be charged with insubordination and necessary procedures taken to terminate the employee in accordance with Board

Policy, state law, and the Charters of Knox County, Tennessee, and the City of Knoxville, where applicable.

An employee who tests positive on a reasonable suspicion test will be in violation of this Policy. Violation of this Policy will constitute grounds for termination in accordance with Board Policy, state law, and the Charters of Knox County, Tennessee, and the City of Knoxville, where applicable.

The Knox County Schools Director of Personnel, or the person authorized to act as the Director in the Director's absence, or the Medical Review Officer are the only individuals in the Knox County School System authorized to make the determination that reasonable suspicion or cause exists to order a drug screen and is the only individual in the Knox County School System who may order an employee to submit to a drug screen.

Two types of cases for which reasonable suspicion procedures may be invoked are:

(1) Chronic case

Deteriorating job performance or changes in personal traits characteristics where the use of alcohol or drugs may be reasonably suspected as the cause. These cases may develop over a fairly long period of time.

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(2) Acute Case

Appearing in a specific incident or observation to then be under the present influence of alcohol and/or drugs or investigation of an accident where the use of alcohol or drugs is reasonably suspected to be a contributing cause. Regardless of any previous history, immediate action is necessary.

Circumstances under which substance screening may be considered, in either the chronic or acute cases, include but are not limited to the following:

1. Observed use, possession, or sale of illegal drugs and/or use, possession, sale, or abuse of alcohol and/or the illegal use or sale of prescription drugs.

2. Apparent physical state of impairment of motor functions.

3. Marked changes in personal behavior not attributable to other factors.

4. Employee involvement in or contribution to an accident where the use of alcohol or drugs is reasonably suspected or employee involvement in a pattern of repetitive accidents, whether or not they involve actual or potential injury.

5. Violations of criminal drug law statutes involving the use of illegal drugs, alcohol, or prescription drugs and/or violations of drug statutes.

The circumstances under which substance screening may be considered, as outlined above, are strictly limited in time and place to employee conduct on duty or during work hours, or on or in Knox County Board of Education property, or at school system-approved or school related functions.

Prior to substance screening, employees will sign an acknowledgement that the summary result will be transmitted to the Medical Review Officer and the Knox County Schools Director of Personnel.

Drug and/or alcohol screening shall be conducted by Board approved, independent, certified laboratories utilizing recognized techniques and procedures, more specifically described in the Drug and Alcohol Abuse Testing Procedures contained in this Policy at Section 3011.11. A breath analysis test may also be performed by the Knox County Sheriff's Department.

.06 ***Promotion and Transfer Testing***

When an employee applies for a position through the Knox County Board of Education's selection process for a job that has been identified by the Knox County Board of Education as being a safety-sensitive position, the employee will be subject to drug testing in accordance with the procedures contained in this Policy before the employee

will be considered a valid candidate for that job opening. An employee who tests positive for illegal drugs on a promotion/transfer test, will no longer be considered an applicant for that position. Such employee will also be in violation of this Policy. Violation of this Policy will constitute grounds for immediate termination in accordance with Board Policy, state law, and the Charters for Knox County, Tennessee, and the City of Knoxville, where applicable.

An employee may withdraw the application for the position at any time up until the employee is scheduled for promotion/transfer testing. Once an employee is scheduled for promotion/transfer testing, if that employee refuses to submit to the test, he/she will be disqualified for consideration for the position and will be considered as being insubordinate and subject to discipline. Under no circumstances will this employee be considered as a viable candidate for any future openings in this classification until the employee has signed a release for drug testing at the time of submitting the application for the position in connection with a job posting.

.07 ***Return to Duty Testing***

An employee who has been given the opportunity to undergo rehabilitation for drugs will, as a condition of returning to duty, be required to agree to a reasonable follow-up testing established by the Director of Personnel. The extent and duration of the follow-up testing will depend upon the safety or security nature of the employee's position, and the nature and extent of the employee's

substance abuse problem. The Director of Personnel is to review the conditions of continued employment with the employee prior to the employee's returning to work. Any such condition for continued employment shall be given to the employee in writing. The Director of Personnel may consult with the employee's rehabilitation program in determining an appropriate follow-up testing program, including, the frequency of any substance screening contained in a follow-up testing program. In no instance shall such screening be ordered by the Director of Personnel more than one (1) time within a seventy-two (72) hour period.

Any employee subject to return to duty testing that has a confirmed positive drug test will be in violation of this Policy. Violation of this Policy will constitute grounds for immediate termination in accordance with Board Policy, state law, and the Charters for Knox County, Tennessee, and the City of Knoxville, where applicable.

.08 ***Rehabilitation***

The Knox County Board of Education recognizes that chemical dependency is an illness that may be successfully treated.

1. It is the policy of the Knox County Schools, where possible, in addition to appropriate personnel action, to refer for rehabilitation an employee with a self-admitted or detected drug or alcohol problem.

2. Employees seeking medical attention for chemical dependency will be entitled to benefits to the extent covered under the Knox County Schools group medical insurance plans, if they have chosen to be covered by said plans.

3. For employees enrolled in a formal treatment/ rehabilitation program, Knox County Schools may grant sick leave and then annual leave until the same are exhausted and then may grant leave without pay not to exceed one (1) year.

4. The cost of the drug rehabilitation or treatment program shall be borne by the employee and/or the employee's insurance provider.

The Knox County Board of Education strongly encourages employees using illegal drugs or alcohol to voluntarily refer themselves to a treatment program. A voluntary referral is defined as being one that occurs prior to any positive test for illegal drugs under this Policy, or prior to any other violation of this Policy, including a criminal conviction of that individual on a drug-related offense. Employees are not subject to disciplinary action for voluntarily referral to rehabilitation, even where rehabilitation is for the use of illegal drugs or alcohol.

.09 *Disciplinary Action*

1. Employees in violation of the provisions of this policy will be subject to disciplinary action up to and including termination.

2. The fact that an employee has been referred for assistance and his/her willingness or ability to rehabilitate are appropriate considerations as to what, if any, personnel action may be taken.

.10 *Confidentiality*

Records that pertain to the Knox County Board of Education employee required substance screens are recognized to be private and sensitive records. They will be maintained by the Medical Review Officer in a secure fashion to insure confidentiality and privacy and be disclosed to the Director of Personnel only to the extent necessary to address any work-related safety risks occasioned by either the drug or alcohol use. The Director of Personnel will maintain any such records in a secure fashion to insure confidentiality and privacy. Medical records, and information relating directly thereto, will be maintained in accordance with provisions of Tennessee law and used with the highest regard for employee privacy consistent with law and the purpose of achieving and maintaining a drug-free workplace. All Personnel records and information regarding referral, evaluation, substance screen results and treatment will be maintained in a confidential manner and no entries concerning such will be placed in an employee's personnel file.

.11 *Drug and Alcohol Abuse Testing Procedures*

1. Purpose

The purpose of this procedure is to establish guidelines to be followed in the drug/alcohol testing of

external applicants for safety-sensitive positions with the Knox County Board of Education as well as Knox County Board of Education employees.

2. Responsibility.

The Knox County Board of Education Director of Personnel has the overall responsibility for this program.

3. Designation of Medical Review Officer.

The Knox County Board of Education has designated Dr. Joseph W. Harb, Room 591, City-County Building, 400 Main Avenue, Knoxville, Tennessee 37902, as the Medical Review Officer (MRO). The Medical Review Officer will be responsible for reviewing the results of drug tests before they are reported to the Knox County Board of Education's Director of Personnel; reviewing and interpreting each confirmed positive test to determine if there is an alternative medical explanation for the positive; conducting an interview with the individual testing positive; reviewing the individual's medical history and medical records made available to the individual to determine if the positive result was caused by legally prescribed medication; requiring a re-test of the original specimen if the MRO deems it necessary; and verifying that the laboratory report and the specimen are correct. The MRO is expected to follow the Medical Review Officer Manual published by the U.S. Department of Health and Human Services for tests conducted under this Policy.

If the MRO determines that there is a legitimate medical explanation for the positive test other than the use of a prohibited drug, the MRO will conclude that the test is negative and will not take any further action. If the MRO concludes that a particular test is scientifically insufficient, the MRO will conclude that the test is negative for that individual. IF the MRO determines that there is no legitimate explanation for the positive test other than use of a prohibited drug, the MRO will communicate the test results as a positive to the Director of Personnel. The results of negative tests will be communicated by the MRO to the Director of Personnel.

4. Designation of Laboratory.

The National Psychopharmacology Laboratory, Inc. (NPL), 9320 Park West Blvd., Knoxville, Tennessee has been selected to perform the testing on specimens submitted. NPL will be responsible for performing the required drug test in accordance with applicable Federal Department of Transportation (DOT) procedures for transportation workplace testing programs, 49 CFR part 40 and, more specifically, as contained in this policy. NPL will also be responsible for properly handling specimens for alcohol testing. NPL is a Substance Abuse and Mental Health Services Administration (SAMHSA) certified lab approved for DOT drug testing.

5. Collection Site.

The MPL Laboratory located at 9320 Park West Blvd., Knoxville, Tennessee is the designated collection site for collecting urine specimens.

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6. Authorization for Testing.

When the person reports to the collection site, the drug and/or alcohol screening procedure will be explained and the person will be asked to assist completing any necessary forms. All persons subject to testing for any reason will be asked to sign the necessary authorization forms which will allow the test to be performed and for the information to be provided to the Medical Review Officer and the Director of Personnel about the required drug and/or alcohol test.

7. Specimen retention.

The retention of specimens for possible future analysis is the responsibility of NPL. NPL will retain all specimens for a minimum period of one (1) week. At such time, negative specimens will be discarded. Positive specimens will be resealed, and retained in a separate and secure area for a minimum of one (1) year. Within this one (1) year period, the person tested, the Medical Review Officer, or the Director of Personnel can request in writing that the laboratory retain the sample for an additional reasonable period specified in the request. If no proper written request is received within the one (1) year period, the sample may be discarded.

Any transfer of the original specimen to another laboratory for reconfirmation of positive results will follow the chain of custody procedures described in the regulations contained in 49 CFR part 40.

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8. Notification and Administrative Processing of Positive Results.

All analytical results, negative and positive, will be reported by the laboratory to the MRO within an average of five (5) days after receiving the specimens. The MRO will review the individual's medical history, questionnaire, relevant bio-medical information, and interview the person to determine if there is any satisfactory explanation for the positive result. The Medical Review Officer may conduct an additional medical interview with the individual and may require the original specimen to be reanalyzed if necessary.

The MRO will advise the Director of Personnel of any positive test results on external applicants where alcohol and drug testing has been required, and where in the view of the MRO, there is not legitimate medical explanation for the confirmed positive test result other than the unauthorized use of an illegal drug.

The MRO will advise the Director of Personnel of any positive drug or alcohol test results on employees that were done for any reason in order that proper disciplinary actions can be coordinated and will advise the Director of Personnel of negative test results.

9. Record Retention — Confidentiality.

Records of drug test results are recognized to be private and sensitive records, which will be maintained in a secure fashion to insure confidentiality. Records showing an employee passed a drug test will be kept for at least one

(1) year. Records showing that an employee failed a drug test, the type of test (e.g., reasonable suspicion), the functions of the employee, the illegal drug(s) used by the employee, and the disposition of each employee will be kept for at least five (5) years. These records, or any of them, may be maintained at the MRO or the Director of Personnel's discretion for an indefinite period of time beyond the above specified minimums.

Information regarding an individual's drug testing results are confidential and will be released by the MRO and the Director of Personnel only upon the written consent of the individual, except that results may be released and relied upon by the Knox County Board of Education in any administrative or court action by the employee involving the drug test, or any discipline resulting from a violation of this Policy, including employment and court proceedings.

10. General Drug Testing Procedures:

A. Test Methods and Cutoff Levels:

The initial test performed on the urine at the laboratory will be the Enzyme-Multiplied-Immunoassay Technique (EMIT) screen which will be used to eliminate negative urine specimens from further consideration. All specimens identified as positive on the initial test shall be confirmed using gas chromatography/mass spectrometry (GC/MS) techniques at the cutoff values listed below. Tests will screen for the drugs listed below. The cutoff levels (positive tests) are as follows:

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		EMIT	*GC/MS*
1.	Marijuana	100 ng/ml	15 ng/ml
2.	Cocaine	300 ng/ml	150 ng/ml
3.	Phencyclidine	25 ng/ml	25 ng/ml
4.	Amphetamines	1,000 ng/ml	500 ng/ml
5.	Methamphetamine	1,000 ng/ml	500 ng/ml
6.	Phenobarbital	300 ng/ml	200 ng/ml
7.	Secobarbital	300 ng/ml	200 ng/ml
8.	Amobarbital	300 ng/ml	200 ng/ml
9.	Butalbital	300 ng/ml	200 ng/ml
10.	Pentobarbital	300 ng/ml	200 ng/ml
11.	Propoxyphene	300 ng/ml	300 ng/ml
12.	Methadone	300 ng/ml	250 ng/ml
13.	Morphine	300 ng/ml	300 ng/ml
14.	Codeine	300 ng/ml	300 ng/ml
15.	Monacetilmorphine	300 ng/ml	300 ng/ml
16.	Benzodiazepines as:		
	(1) Diazepam	300 ng/ml	250 ng/ml
	(2) Oxazepam	300 ng/ml	250 ng/ml
	(3) Desmephyldiazepam	300 ng/ml	250 ng/ml

B. Collection of Specimens.

Specimens will be collected in accordance with Department of Transportation Procedures for Transportation Workplace Drug Testing Programs 49 C.F.R. Part 40 which are incorporated herein by reference, with the exceptions as noted in this Policy. At least 30 ml of urine will be required to complete the test or the test will be rejected and must be reperformed.

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The designated collection site shall have an enclosure within which private urination can occur, a toilet for completion of urination and a source of water for washing hands.

Procedures for collecting urine specimens shall allow individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen as specified in 49 C.F.R. §40.25. Examples of reasonable cause to believe a specimen will be altered or substituted include: the presentation of a urine specimen that falls outside the normal temperature range (90.0 deg. F - 100.0 deg. F); presentation of a specimen with a specific gravity of less than 1.0003 and a creatinine concentration below .2g/l; presentation of a specimen which contains the presence of adulterants; observation of conduct clearly indicating an attempt to substitute or adulterate the sample.

NPL will follow the Department of Transportation Procedures for preparation for testing, chain of custody, security, privacy, integrity, and identity of specimen, and any necessary transportation to a laboratory. *See* 49 C.F.R. Part 40 §40.23 and 40.25. The person submitting specimens will complete the urine custody and control forms as required by NPL. A copy of the "Drug Testing Custody And Control Form" is contained in Appendix A to this policy.

11. General Alcohol Testing Procedure:

The Knox County Sheriff's Department will be requested to perform and be responsible for administering

a breath analysis test. If the breath analysis test is positive, a second breath analysis test may be taken. If a test is to be made for drugs, this specimen will be taken at the same time that the alcohol specimen is taken, but will be processed as a separate specimen.

A. Collection of Specimen:

Procedures for taking the urine specimen in the event of a positive breath analysis for alcohol assay, will follow the same procedures as outlined in Part 10 above for the drug specimen and the specimen will be tightly sealed immediately to avoid loss of volatile constituents.

B. Test Methods and Levels:

The breath analysis test level to be considered positive will be .02 which would lead to a confirming test.

The alcohol urine assay will be an EMIT screening followed by a confirmatory gas chromatography test on positive screens. Either test will be considered positive if the results are .04 or more.

12. Specific Testing Procedures:

A. Pre-Employment/Post Job Offer.

Interested individuals are made aware of the requirements of drug testing for a specific position prior to submitting an application for the position. Pre-employment drug and alcohol testing will be required for the designated

safety-sensitive positions. Applicants will be given an offer of employment prior to the test. Employment is contingent upon passing the test.

Applicants for positions which require drug and alcohol testing will report to the designated collection site upon notification by the Knox County Board of Education's Director of Personnel of the time and date to report.

NPL is responsible for gathering the medical history of the applicant and will take the urine sample(s).

All applicants will be furnished a copy of the Drug Free Workplace Substance Abuse Policy in advance of the drug testing and alcohol testing, and will have the screening procedure explained to them.

Applicants will be asked to sign an authorization for the tests which will release the MRO to disclose the results of the drug and alcohol test to the Director of Personnel. In the event an applicant refuses to execute the appropriate authorization or to submit to the drug and alcohol tests, NPL will suspend the procedures at that point and refer the applicant to the Director of Personnel.

The MRO will review the analytical results of the drug and alcohol tests, review the individual's medical history questionnaire, relevant biomedical information and interview the applicant, either by phone or in person, to determine whether here is any satisfactory explanation for a positive result. The MRO may conduct an additional medical interview with the individual, and may require the

original specimen to be reanalyzed if necessary. The MRO will advise the Director of Personnel of any positive test results where there is not a legitimate explanation for the positive test.

The MRO will advise the applicant that he or she has tested positive and, if requested, will allow the applicant a reasonable period, not to exceed three (3) days, to provide additional medical evidence of a proper prescription for the drug(s) which caused the positive test.

Nothing herein shall be construed as requiring the MRO or the Director of Personnel to disclose to the applicant the drug(s) for which the applicant tested positive. Rather, it is the duty of the applicant to disclose to the MRO and, upon request, to provide the MRO with evidence of all drugs taken by prescription.

In the event of a positive test where there is not a legitimate medical explanation, the Director of Personnel will advise the applicant in accordance with the Drug-Free Workplace Substance Abuse Policy of the conditions that must be met before the individual could again by considered for employment with the Knox County Board of Education.

The designated safety-sensitive positions subject to testing are: principal, assistant principal, teacher, traveling teacher, teacher aide, substitute teacher, school secretary, and school bus driver.

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B. Reasonable Suspicion Testing:

This testing will be conducted for any employee whenever the Knox County Board of Education, through the Director of Personnel, or someone authorized in his/her absence, and/or the MRO suspects that there is a violation of the Knox County Board of Education Drug-Free Workplace Substance Abuse Policy. The guidelines for determining reasonable suspicion, as noted above, will be followed.

Once the determination has been made that an employee is to be tested based upon reasonable suspicion, the Director of Personnel should then transport the employee to the collection site, or make other appropriate arrangements for transportation. The collection site personnel should be notified that the reason for testing is reasonable suspicion.

Upon arriving at the collection site, the employee will be asked to sign a release for testing and to assist in completing the necessary forms for testing. After the employee has signed the necessary releases for testing, then the standard procedures for drug and alcohol testing should be followed by the collection site personnel.

Once the procedure has been completed, the employee should be transported back to the Director of Personnel's office where the employee will be placed on administrative leave with pay until the results of the tests are available and given instructions to call the Director of Personnel each work day, before the normal reporting time for that employee, for further instructions.

If the employee refuses to sign the release or refuses to be tested by NPL, the employee should be advised that refusal under Board Policy is insubordination. If the employee continues to refuse, the employee should be transported back to the Director of Personnel's office. The Director of Personnel will place the employee on administrative leave with pay with instructions to call his/her office before the normal reporting time for that employee on the following work day.

If the Director of Personnel feels that the employee is in no condition to operate a vehicle, then the employee should be transported home. Under no circumstances should the employee be allowed to drive, and if the employee insists, the Director of Personnel should tell the employee that if he/she gets in a vehicle to drive that he/she will call the police or the Sheriff's Department and give them the location, license plate number, etc.

In the event of positive test results, the MRO will contact the Director of Personnel who will then review other records of the employee and contact the Knox County Law Director to work out proper disciplinary procedures, if any, in accordance with Board Policy, state law, and the Charters of Knox County, Tennessee, and City of Knoxville, where applicable.

C. Promotion and Transfer Testing:

Once an employee has applied for a safety-sensitive position within the Knox County Board of Education that requires drug and alcohol testing and has successfully

completed the written and skills testing being administered for that job, then the employee is considered as one of the qualified applicants for the position and will be subject to the drug and alcohol testing procedures. Up to this point an applicant can withdraw from consideration for the position without sanctions.

The Director of Personnel will notify the employee on the day the testing is to be accomplished as to the time for the employee to be at the designated collection site. Since this testing will be done before or after the employee's normal working hours, the employee must be contacted before the end of that employee's shift. Employees should be tested as soon after their shift as possible.

Once the employee has been scheduled for testing, if the employee refuses to be tested, the employee will be considered insubordinate and subject to disciplinary procedures. If an employee has been notified to go for testing and fails to show up for the test, this will be considered the same as refusal to test unless a medical emergency or accident prevents the employee from testing, in which case credible documentation will be required that substantiates the reason for being absent from the testing. If in the sole discretion of the Director of Personnel the employee is allowed to be tested at a later date, the above procedure will be repeated. In no case will an employee be allowed more than one (1) opportunity to be rescheduled for testing.

Employees who refuse to be tested, or who do not appear for testing and do not have a documented credible

reason for being absent from the testing time, will be subject to disciplinary procedures, will cease to be considered as a viable candidate for the current position and for any future position openings in this classification until the employee has signed a release for drug testing at the time of submitting any future applications for this classification.

The collection site personnel should notify the Director of Personnel in the event an employee refuses to test or does not show for testing.

In the event of positive test results, the MRO will contact the Director of Personnel who will then review other records of the employee and contact the Knox County Law Director to work out proper disciplinary procedures, if any, in accordance with Board Policy, state law, and the Charters of Knox County, Tennessee, and the City of Knoxville, where applicable.

D. Return to Duty Testing:

This testing will apply when an employee who has been given an opportunity for rehabilitation for drugs and or alcohol is returned to duty. Prior to the employee coming back on the job, the employee must be examined by the MRO and a drug and/or alcohol test done which shows negative results. The Director of Personnel may consult with the MRO and the rehabilitation program officials to determine an appropriate follow-up testing program following Board policy and prepare a follow-up-program which will include, among other things, the appropriate period for testing as determined. This Agreement must be

signed by the employee before the employee is allowed to return to the job.

All testing done as a result of the above conditions will be conducted in accordance with the procedures contained herein for drug testing.

In the event of positive test results, the MRO will contact the Director of Personnel who will contact the Knox County Law Director to work out disciplinary procedures, if any, in accordance with Board Policy, state law, and the Charters for Knox County, Tennessee, and the City of Knoxville, where applicable.

E. Changes to Procedures:

This procedure may be amended from time to time to facilitate changes in the Knox County Board of Education's Drug-Free Workplace Substance Abuse Policy as necessary.

.12 ***Definitions: As used in this Policy***

1. "Illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 U.S.C. §812). Such term does not include the use of a drug taken under the supervision by a licensed healthcare professional, or other uses authorized by the Controlled Substances Act.

2. "Drug" or "Illegal drug" means a controlled substance as defined in Schedules I through V of Section 202 of the Controlled Substances Act.

3. "Conviction" means a finding of guilt, including a plea of no-contest, or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the federal or state criminal drug statutes.

4. "Criminal Drug Law" means a federal or non-federal criminal statute involving the manufacture, distribution, dispensing, possession, or use of any controlled substance.

NOTE: ALL REFERENCED DOCUMENTS IN THIS POLICY ARE AVAILABLE FOR INSPECTION IN THE KNOX COUNTY BOARD OF EDUCATION'S DIRECTOR OF PERSONNEL OFFICE.

APPENDIX B — RELEVANT STATUTES

Tenn. Code § 49-2-203

49-2-203. Powers and duties [See the Compiler's Notes]. — (a) It is the duty of the local board of education to:

(1) [See Compilers Notes] Elect, upon the recommendation of the superintendent, teachers who have attained or are eligible for tenure and fix the salaries of and make written contracts with such teachers;

(A) No individual shall be elected to an interim contract unless the individual so elected is to fill a vacancy created by a leave of absence as set forth in § 49-5-702;

(B) All contracts with educational assistants will be for nonteaching positions;

(C) Educational assistants shall be subject to direct supervision of certificated teachers when directly involved in the instructional program;

(D) No member of any local board of education shall be eligible for election as a teacher, or any other position under the board carrying with it any salary or compensation;

(2) Manage and control all public schools established or that may be established under its jurisdiction;

(3) In local education agencies which retain elected superintendents, the board shall continue to employ janitors, engineers, and such other persons as may be necessary to care for school property, and fix their compensation;

(4) Purchase all supplies, furniture, fixtures and material of every kind through the executive committee;

(A) All expenditures for such purposes estimated to exceed five thousand dollars ($5,000) or more shall be made on competitive bids, which shall be solicited by advertisement in a newspaper of general circulation in the county, except that the newspaper advertisement may be waived in the event of any emergency. School districts which have a purchasing division may use a comprehensive vendor list for the purpose of soliciting competitive bids; provided, that the vendors on such list are given notice to bid; and provided further, that such purchasing division shall periodically advertise in a newspaper of general circulation in the county for vendors and shall update the list of vendors following such advertisement;

(B) All purchases of less than five thousand dollars ($5,000) may be made in the open market without newspaper notice, but shall whenever possible be based upon at least three (3) competitive bids;

(C)(1) No county board of education shall contract for the construction of school buildings

or additions to existing buildings, the expenditure for which is in excess of ten thousand dollars ($10,000) except when such contract be made after competitive bids. Public notice shall be given at least ten (10) days in advance of accepting bids for such construction, and the board shall award the contract to the lowest and best bidder. In the event no bid is within the budgetary limits set by the board for such construction, the board may negotiate with the lowest and best bidder to bring the cost of the construction within the funds available, with the approval of the commissioner of education;

(2) Construction management services which are provided for a fee and which involve supervision of the planning, design, bid and construction phases of the project, but not the performance of actual construction work, are deemed to be professional services and may be performed by a qualified person on the basis of recognized competence and integrity. The provisions of this subdivision shall not be construed to authorize or permit actual construction work by a construction manager who has been hired for a construction project or to modify or suspend any competitive bid provisions of the law applicable to the construction work which is under the supervision of such construction manager as applicable only under this section. Contracts for such services shall be procured through competitive bids as

provided in this subsection or by a request for proposals process. The request for proposals process will invite prospective proposers to participate and will indicate the service requirements and the factors used for evaluating the proposals. Such factors shall include cost, vendor's qualification and any additional factor or factors deemed relevant by the procuring entity for procurement of the service; cost is not to be the sole criteria for evaluation. The contract for such services will be awarded to the best evaluated, responsive proposer;

(3) A contract manager who provides construction management services must be a contractor licensed in Tennessee;

(D) No board of education shall be precluded from purchasing materials and employing labor for the construction of school buildings or additions thereto;

(E) The provisions of subdivisions (a)(4)(A), (B) and (D) apply to local boards of education of all counties, municipalities and special school districts; provided, that subdivisions (a)(4)(A) and (B) shall not apply to purchases by or for a county's or metropolitan government's board of education in counties with a population of not less than two hundred thousand (200,000) according to any federal census, so long as the county, through county or

metropolitan government charter, private act, or ordinance, establishes a procedure regarding purchasing that provides for advertisement and competitive bidding and sets a dollar amount for each purchase requiring advertisement and competitive bidding; and provided further, that purchases of less than the dollar amount requiring advertisement and competitive bidding shall, wherever possible, be based upon at least three (3) competitive bids.

(5) Order warrants drawn on the county trustee on account of the elementary and the high school funds, respectively;

(6) Visit the schools whenever, in the judgment of the board, such visits are necessary;

(7) Except as otherwise provided in this title, dismiss teachers, principals, supervisors, and other employees, upon sufficient proof of improper conduct, inefficient service, or neglect of duty; provided, that no one shall be dismissed without first having been given in writing due notice of the charge or charges and an opportunity for defense;

(8) Suspend, dismiss or alternatively place pupils when the progress or efficiency of the school makes it necessary or when disruptive, threatening or . . .

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PART 5 — TEACHERS' TENURE

Tenn. Code § 49-5-501

49-5-501. Definitions. — As used in this part, unless the context otherwise requires:

(1) "Abolition of position" means a regular bona fide elimination of a position for sufficient, just and nondiscriminatory reasons;

(2) "Board" means the local board of education holding jurisdiction in its respective territory. In the event that a school system operates without a board of education, the authority which performs the functions usually performed by a board shall be indicated by the word "board";

(3) "Conduct unbecoming to a member of the teaching profession" may consist of, but not be limited to, one (1) or more of the following:

(A) Immorality;

(B) Conviction of a felony or a crime involving moral turpitude;

(C) Dishonesty, unreliability, continued willful failure or refusal to pay one's just and honest debts;

(D) Disregard of the code of ethics of the Tennessee Education Association in such manner

as to make one obnoxious as a member of the profession; or

(E) Improper use of narcotics or intoxicants;

(4) "Incompetence" means being incapable, lacking adequate power, capacity or ability to carry out the duties and responsibilities of the position. This may apply to physical, mental, educational, emotional or other personal conditions. It may include lack of training or experience; evident unfitness for service; physical, mental or emotional condition making teacher unfit to instruct or associate with children; or inability to command respect from subordinates or to secure cooperation of those with whom the teacher must work;

(5) "Inefficiency" means being below the standards of efficiency maintained by others currently employed by the board for similar work, or habitually tardy, inaccurate, or wanting in effective performance of duties;

(6) "Insubordination" may consist of:

(A) Refusal or continued failure to obey the school laws of Tennessee, or to comply with the rules and regulations of the board, or to carry out specific assignments made by the board, the superintendent or the principal, each acting within its own jurisdiction, when such rules, regulations and assignments are reasonable and not discriminatory;

(B) Failure to participate in an in-service training program as set up by the local board of education and approved by the state board of education;

(C) Treason, or any effort to sabotage or overthrow the government of the United States; or

(D) Refusal by the teacher to disclose to the board whether or not such teacher is, or has been, a member of the Communist or any other party which advocates the overthrow of the government;

(7) "Neglect of duty" means gross or repeated failure to perform duties and responsibilities which reasonably can be expected of one in such capacity, or continued unexcused or unnecessary absence from duty;

(8) "Probation" is a condition and period of trial during which a teacher is under observation to determine such teacher's fitness for tenure status;

(9) "Superintendent" refers to the local superintendent of schools, or to any other officer performing the functions of a superintendent;

(10) "Teacher" includes teachers, supervisors, principals, superintendents and all other certificated personnel employed by any local board of education, for service in public, elementary and secondary schools in

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Tennessee, supported in whole or in part by state or federal funds;

(11)(A) "Tenure" indicates the statutory requirements, conditions, relations and provisions in this part, under which a teacher employed by a board holds a position as a teacher under the jurisdiction of the board. Administrative and supervisory personnel shall have tenure as teachers and not necessarily tenure in the specific type of position in which they may be employed;

(B) "Limited tenure" is a form of tenure under which a teacher may have a position for a limited period of time and may extend such tenure for a like period of time by meeting certain requirements set forth in this part;

(C) "Permanent tenure" refers to a term and condition of tenure, extending from the time when the teacher acquires the status of permanent tenure until such time as the teacher arrives at the maximum age set forth in this part, resigns, retires or is dismissed under provisions of this part; and

(12) "Transfer" means removal from one (1) position to another position under jurisdiction of the same board. [Acts 1951, ch. 76, § 1 (Williams, . . .

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Tenn. Code § 49-5-502

49-5-502. Construction with other statutes. — (a) The Teachers' Continuing Contract Law, § 49-5-409, shall not be construed to be affected by the provisions of this part, except that the continuing contract law shall not apply to teachers who have acquired permanent or limited tenure under this part.

(b)(1) This part shall not affect the operation of local or private tenure acts in operation on March 1, 1951, applying to counties, municipalities or special school districts.

(2) This part shall not be operative in any such county, municipality or special school district so long as such local or private act remains in effect.

(3) This part shall become operative in any system where there is, on March 1, 1951, a local tenure law in effect, if and when the local law becomes inoperative. [Acts 1951, ch. 76, §§ 14, 18 (Williams, §§ 2345-14, 2345.18); modified; T.C.A. (orig. ed.), §§ 49-1418, 49-1419.]

Tenn. Code § 49-5-503

49-5-503. Types of tenure. — There are two (2) types of tenure for teachers who are now or hereafter employed in the public schools, as follows:

(1) "Limited tenure" applies to any teacher who is not classified as having "permanent tenure," but who, prior to September 1, 1972:

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(A) Has completed two (2) years of college (but less than bachelor's degree), and holds a valid professional license covering the grades or subjects taught, or holds a valid examination license covering the grades or subjects taught regardless of the number of years of college completed;

(B) Completes a probationary period of three (3) school years or not less than twenty-seven (27) months within a five-year period, the last school year to be as a regularly employed teacher; and

(C) Is then reemployed by the board for service after the probationary period and maintains continuous "limited tenure" status thereafter; and

(2) "Permanent tenure" applies to any teacher who:

(A) Has a degree from an approved four-year college or to any vocational teacher who has the equivalent amount of training established and licensed by the state board of education;

(B) Holds a valid professional license based on training covering the subjects or grades taught;

(C) Has completed a probationary period of three (3) school years or not less than twenty-

seven (27) months within the last five-year period, the last year to be employed as a regular teacher; and

(D) Is reemployed by the board for service after the probationary period. [Acts 1951, ch. 76, § 3 (Williams, § 2345.8); modified; Acts 1971, ch. 22, §§ 1, 2; 1977, ch. 33, § 1; T.C.A. (orig. ed.), § 49-1402; Acts 1987, ch. 308, § 25.]

Tenn. Code § 49-5-504

49-5-504. Probation. — (a) Any teacher, otherwise qualified for "permanent tenure" status or "limited tenure" status shall serve three (3) years or not less than twenty-seven (27) months within a five-year period as a probationary teacher before acquiring "permanent tenure" status or "limited tenure" status.

(b) Upon completion of the probationary period, any teacher who is reemployed or retained in the system is entitled to the tenure status for which such teacher is qualified by college training and licensing; provided, that the superintendent shall notify the board prior to reelection by the board that the teacher, if reelected, will attain tenure status.

(c) Time spent on leave of absence, except sick leave as provided in § 49-5-710, shall not be counted as a part of the probationary period. [Acts 1951, ch. 76, §§ 4, 8 (Williams, §§ 2345.4, 2345.8); Acts 1965, ch. 195, § 1; 1973, ch. 298, § 1; T.C.A (orig. ed.), §§ 49-1403, 49-1406; Acts 1987, ch. 308, § 26.]

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Tenn. Code § 49-5-505

49-5-505. Limited tenure. — (a) "Limited tenure" status shall be for a period of three (3) years. Acquiring not less than eighteen (18) quarter hours of college credit during the three-year period of "limited tenure" entitles the teacher to renewal of the teacher's tenure status, and upon receiving proper statement from the college, verifying credits received, the board shall extend the teacher's tenure status for another three-year period.

(b) A limited tenure teacher shall become a permanent tenure teacher when the teacher earns a bachelor's degree and has otherwise complied with the provisions of this part.

(c) A teacher on "limited tenure" who fails, during any three-year period, to meet the foregoing requirements of acquiring at least eighteen (18) quarter hours' credit shall automatically lose "limited tenure" status and shall not be eligible to again attain "limited tenure" status in any local school system.

(d) Only those teachers who have attained "limited tenure" status prior to September 1, 1972, and who continuously maintain the requirement of this section are covered by the provisions of this section.

(e) The superintendent of each county, city and special school system shall establish a roster of "limited tenure" teachers in the superintendent's respective school system as of September 1, 1972, and shall provide a copy of the roster to the commissioner of education and notify each

person on the roster, prior to December 31, 1972, of the provisions pertaining to retaining "limited tenure" status. [Acts 1951, ch. 76, § 5 (Williams, § 2345.5); Acts 1967, ch. 195, § 1; Acts 1971, ch. 22, §§ 3, 4; 1974, ch. 654, § 77; T.C.A. (orig. ed.), § 49-1404.]

Tenn. Code § 49-5-506

49-5-506. Local standards may apply. — The local board of education has the authority to set standards of employment or to maintain educational requirements of the personnel in service over and above those required by the state board of education whenever the board is in position to support the superior program; provided, that such requirements are general in their application and have the approval of the state board of education. [Acts 1951, ch. 76, § 13 (Williams, § 2345.13); Acts 1961, ch. 226, § 1; 1963, ch. 236, § 1; T.C.A. (orig. ed.), § 49-1405.]

Tenn. Code § 49-5-507

49-5-507. Retirement age. — A teacher's tenure status shall terminate as of July 1, following the sixty-fifth anniversary of the teacher's birth. [Acts 1951, ch. 76, § 12 (Williams, § 2345.12); Acts 1961, ch. 226, § 2; 1963, ch. 236, § 2; T.C.A. (orig. ed.), § 49-1407.]

Tenn. Code § 49-5-508

49-5-508. Breach of contract — Effect on tenure. — (a) A teacher shall give the superintendent notice of resignation at least thirty (30) days in advance of the

effective date of the resignation. A teacher who fails to give such notice, in the absence of justifiable mitigating circumstances, shall forfeit all tenure status under this part; provided, that the board may waive the thirty (30) days' notice requirement and permit a teacher to resign in good standing.

(b) Any teacher who breaks a contract with a board of education without a justifiable reason as listed in this section shall not be given permanent tenure status in any other school system in this state, until such teacher has met all of the requirements in such system for attaining such permanent status plus the serving of five (5) continuous years in lieu of the three (3) continuous years required in § 49-5-503; provided, that the local board of education against which such teacher has broken a contract informs the commissioner of education of such breach of contract and requests the commissioner to so notify all local boards of education in this state. Such local board of education may later inform the commissioner that it is no longer holding the breach of contract against the teacher, in which event such local board of education shall request the commissioner to so notify all local boards of education in this state. If and when such local board of education informs the commissioner that it is no longer holding the breach of contract against the teacher, the penalty in this subsection against such teacher shall immediately become ineffective, null and void.

(c) The conditions under which it is permissible to break a contract with a local board of education are as follows:

(1) The incapacity on the part of the teacher to perform the contract as evidenced by the certified statement of a physician approved by the local board of education;

(2) The drafting of the teacher into military service by a selective service board; or

(3) The release by the local board of education of the teacher from the contract which the teacher has entered into with such local board of education. [Acts 1951, ch. 76, § 9 (Williams, § 2345.9); Acts 1961, ch. 226, § 3; 1974, ch. 654, § 78; T.C.A. (orig. ed.), § 49-1408.]

Tenn. Code § 49-5-509

49-5-509. Teacher transferred to another system. — Tenured teachers moving to another system shall serve the regular probationary period in the new system. The local board of education, upon the recommendation of the superintendent, may waive this requirement and grant tenure status or shorten the probationary period, as it sees fit. [Acts 1951, ch. 76, § 11 (Williams, § 2345.11); T.C.A. (orig. ed.), § 49-1409.]

Tenn. Code § 49-5-510

49-5-510. Transfers within system. — The superintendent, when necessary to the efficient operation of the school system, may transfer a teacher from one location to another within the school system, or from one type of work to another for which the teacher is qualified and licensed; provided, that transfers shall be acted upon in

accordance with board policy and any locally negotiated agreement. [Acts 1951, ch. 76, § 10 (Williams, § 2345.10); Acts 1957, ch. 202, § 1; 1965, ch. 196, § 1; 1969, ch. 286, § 1; 1970, ch. 480, § 1; T.C.A. (orig. ed.), § 49-1411; Acts 1987, ch. 308, § 27; 1992, ch. 535, § 15; 1998, ch. 826, § 2.]

Tenn. Code § 49-5-511

49-5-511. Dismissal or suspension of teachers generally. — (a)(1) No teacher shall be dismissed or suspended except as provided in this part.

(2) The causes for which a teacher may be dismissed are as follows: incompetence, inefficiency, neglect of duty, unprofessional conduct and insubordination as defined in § 49-5-501.

(3) A superintendent may suspend a teacher at any time that may seem necessary, pending investigation or final disposition of a case before the board or an appeal. If vindicated or reinstated, the teacher shall be paid the full salary for the period during which the teacher was suspended.

(4) When charges are made to the board of education against a teacher, charging the teacher with offenses which would justify dismissal of the teacher under the terms of this part, the charges shall be made in writing, specifically stating the offenses which are charged, and shall be signed by the party or parties making the charges.

(5) If, in the opinion of the board, charges are of such nature as to warrant the dismissal of the teacher, the superintendent shall give the teacher a written notice of this decision, together with a copy of the charges, and a copy of a form which shall be provided by the commissioner of education advising the teacher as to the teacher's legal duties, rights and recourse under the terms of this part.

(b)(1) When it becomes necessary to reduce the number of teaching positions or nonlicensed positions in the system because of a decrease in enrollment or for other good reasons, the board shall be empowered to dismiss such teachers or nonlicensed employees as may be necessary.

(2) The board shall give the teacher or nonlicensed employee written notice of dismissal explaining fully the circumstances or conditions making the dismissal necessary.

(3) A tenured teacher who has been dismissed because of abolition of position shall be placed on a preferred list for reemployment in the first vacancy the teacher is qualified by training and experience to fill. Nothing in this subsection shall be construed to deprive the board of the power to determine the fitness of such teacher for reemployment in such vacancy on the basis of the board's evaluation of such teacher's competence, compatibility and suitability to properly discharge the duties required in such vacancy considered in the light of the best interest of the students in the school where the vacancy exists. [Acts 1951, ch. 76, §§ 2, 6, 7, 15 (Williams, §§ 2345.2, 2345.6, 2345.7, 2345.15); Acts 1955, ch. 343, § 2; T.C.A. (orig. ed.), §§ 49-1410, 49-1412 — 49-1415; Acts 1989, ch. 197, § 1; 1990, ch. 948, § 23.]

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Tenn. Code § 49-5-512

49-5-512. Dismissal or suspension — Hearing. — (a) A teacher, having received notice of charges pursuant to § 49-5-511, may, within thirty (30) days after receipt of notice, demand a hearing before the board, as follows:

(1) The teacher shall give written notice to the superintendent of the teacher's request for a hearing;

(2) The superintendent shall, within five (5) days after receipt of request, indicate the place of such hearing and set a convenient date, which date shall not be later than thirty (30) days following receipt of notice demanding a hearing;

(3) The teacher may appear at the hearing and plead the teacher's cause in person or by counsel;

(4) The teacher may present witnesses, and shall have full opportunity to present the teacher's contentions and to support them with evidence and argument. The teacher shall be allowed a full, complete, and impartial hearing before the board, including the right to have evidence deemed relevant by the teacher included in the record of the hearing, even if objected to by the person conducting the hearing;

(5) The chair of the board conducting the hearing is hereby empowered to issue subpoenas for witnesses to compel their attendance at hearings authorized under this section. All parties to the proceeding shall have the right to have subpoenas issued by the chair of the board to compel

the attendance of all witnesses deemed by such parties to be necessary, for a full and complete hearing. All witnesses shall be entitled to the witness fees and mileage provided by law for legal witnesses, which fees and mileage shall be paid as a part of the costs of such proceeding. The costs of such proceeding shall be paid by the losing party;

(6) The chair of the board shall administer oaths to witnesses, who shall testify under oath;

(7) A record of the hearing, either by transcript, recording, or as is otherwise agreed by the parties, shall be prepared, if the action of the board is appealed, and all actions of the board shall be reduced to writing and included in the record, together with all evidence otherwise submitted;

(8) On request of either party to the trial, witnesses may be barred from the hearing except as they are called to testify. The hearing may be private at the request of the teacher or in the discretion of the board; and

(9) The board shall within ten (10) days decide what disposition to make of the case and shall immediately thereafter give the teacher written notice of its findings and decision.

(b) The superintendent or other school officials shall not be held liable, personally or officially, when performing their duties in prosecuting charges against any teacher or teachers under this part. [Acts 1951, ch. 76, § 16 (Williams, § 2345.16); Acts 1972, ch. 588, § 1; T.C.A. (orig. ed.), § 49-1416; Acts 1992, ch. 535, § 83.]

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Tenn. Code § 49-5-513

49-5-513. Judicial review. — (a) A teacher under "permanent tenure" or "limited tenure" status who is dismissed or suspended by action of the board may petition for a writ of certiorari from the chancery court of the county where the teacher is employed.

(b) The petition shall be filed within thirty (30) days from the receipt by the teacher of notice of the decision of the board. The petition shall state briefly the issues involved in the cause, the substance of the order of the board, or the respects in which the petitioner claims the order of the board is erroneous, and praying for an accordant review. The petition shall be addressed to the presiding chancellor and shall name as defendants the members of the board and such other parties of record, if such, as were involved in the hearing before the board.

(c) The petitioner shall give bond for costs as in other chancery suits or oaths of paupers in lieu.

(d) Upon the filing of the petition, the clerk and master shall immediately send, by registered return receipt mail, to the chair of the board, a notice of the filing of the petition and a certified copy thereof. The clerk shall also send a similar notice to the last known post office address of each other party named as defendant. In lieu of notice by registered mail, subpoena to answer may be served personally on each defendant, as in other chancery cases.

(e) The filing of such petition shall suspend the order of the board pending a decision by the chancellor, but the

teacher shall not be permitted to return to teaching pending final disposition of the appeal.

(f) All defendants named in the petition, desiring to make defense, shall do so by answer (in which grounds of demurrer shall be incorporated) to the petition within thirty (30) days from the date of the filing of the petition, unless the time be extended by the court. Any other person who may be affected by the decision to be made by the court may, upon proper leave given, intervene and file an answer in the cause. Amendments may be granted as in other chancery procedure.

(g) The cause shall stand for trial and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue. The review of the court shall be limited to the written record of the hearing before the board and any evidence or exhibits submitted at such hearing. Additional evidence or testimony shall not be admitted except as to establish arbitrary or capricious action or violation of statutory or constitutional rights by the board.

(h) The chancellor shall reduce the chancellor's findings of fact and conclusions of law to writing and make them parts of the record.

(i) Any party dissatisfied with the decree of the court may appeal as provided by the Tennessee Rules of Appellate Procedure, where the cause shall be heard on the transcript of the record from the chancery court. [Acts 1951, ch. 76, § 17 (Williams, § 2345.17); Acts 1981, ch. 449, § 2; T.C.A. (orig. ed.), § 49-1417; Acts 1992, ch. 535, § 83; 1992, ch. 952, § 6.]

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Tenn. Code § 49-5-514

49-5-514. Merger of local with state tenure system. — (a)(1) Should it be desired to incorporate any local teacher tenure system into the state system, the board having jurisdiction over the teachers under such local system shall publish in some newspaper of general circulation in the town or county in which such local tenure system is located a notice of its intent to apply for admission to the state teacher tenure system, and, in such notice, shall fix the date for a hearing thereon, which date shall not be less than ten (10) days after the first publication of the notice.

(2) Upon the day fixed by such notice for such hearing, which hearing may be adjourned from time to time if deemed necessary, the board shall hear interested parties who shall have the right to appear in person or by counsel upon the advisability of such entry or merger into the state system.

(3) After the local board of education concludes its hearing, the board shall conduct a referendum of the teachers within the local teacher tenure system, and if a majority of the teachers vote in favor of merging with the state system, then the board shall request such merger and shall forward a certified copy of the result of the referendum to the commissioner of education for consideration.

(4) If the commissioner should approve such merger, then the commissioner shall give proper notice thereof and at the end of ten (10) days from the giving of such public notice of acceptance, such local tenure system shall be

merged with and become a part of the state teacher tenure system, and the members of such local tenure system shall thereupon be entitled to all the benefits of such state tenure system to the same extent as though they had been members thereof from its inception.

(b) As used in this section:

(1) "Board" means any county board of education in a county operating under a local teacher tenure act or any municipal board of education in a city operating under such act; and

(2) "Local teacher tenure systems" means any teacher tenure system applicable only to a county or to a city or town and authorized by special act of the general assembly. [Acts 1953, ch. 263, §§ 1, 2 (Williams, § 2345.19); Acts 1957, ch. 179, § 1; T.C.A. (orig. ed.), § 49-1420.]

Tenn. Code § 49-5-515

49-5-515. Establishment of system for teachers not previously covered. — (a) The state board of education is hereby authorized and directed to establish a system of tenure for teachers in schools and institutions under its jurisdiction.

(b) The board shall promulgate and publish reasonable rules and regulations for the establishment of a tenure system for such teachers, and has the power to promulgate and publish such rules and regulations as are deemed reasonably necessary for the establishment of such tenure

system, which shall include, but not be limited to, standards and requirements concerning:

(1) The minimum qualifications of teachers eligible for tenure;

(2) The types of tenure;

(3) Leaves of absence;

(4) Time of termination of tenure;

(5) Transfers within the system;

(6) Credit for time served in other school systems within the state;

(7) Grounds and procedures concerning suspensions and dismissals;

(8) Investigations;

(9) Suspensions pending investigations; and

(10) Such other subjects as are deemed by the board to be reasonably related to teacher's tenure.

(c) The rules and regulations shall be adopted by a formal resolution by a majority of the membership, and the same shall be signed by a majority of the members of the state board of education as certified by the chair and attested by the executive secretary of the board, and otherwise they

shall be approved and filed in the manner required by the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

(d) After giving written notice of charges against any teacher, the board shall hold a hearing in the same manner and shall have the same powers as provided in § 49-5-512; provided, that where such section refers to the superintendent, for the purpose of this part, reference shall be made to the chair of the state board of education.

(e) A teacher shall be entitled to a judicial review of the action of the board for the same purposes and in the same manner provided by § 49-5-513.

(f) As used in this section, "teacher" means any person employed by the state board of education in a full-time position as an administrative officer or teacher in a school or other educational institution except a college or university; provided, that "teacher," as defined in this section, does not apply to the principal or chief administrative officer of such school or institution.

(g) No teacher under the provisions of this section shall be guaranteed continuity of employment in a particular assignment or position. [Acts 1967, ch. 210, §§ 1-3; T.C.A. §§ 49-1423 — 49-1425.]

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PART 34 — SUSPENSION OF STUDENTS

Tenn. Code § 49-6-3401

49-6-3401. Suspension of students. — (a) Any principal, principal-teacher or assistant principal of any public school in this state is authorized to suspend a pupil from attendance at such school, including its sponsored activities, or from riding a school bus, for good and sufficient reasons. Good and sufficient reasons for such suspension include, but are not limited to:

(1) Willful and persistent violation of the rules of the school or truancy;

(2) Immoral or disreputable conduct or vulgar or profane language;

(3) Violence or threatened violence against the person of any personnel attending or assigned to any public school;

(4) Willful or malicious damage to real or personal property of the school, or the property of any person attending or assigned to the school;

(5) Inciting, advising or counseling of others to engage in any of the acts hereinbefore enumerated;

(6) Marking, defacing or destroying school property;

(7) Possession of a pistol, gun or firearm on school property;

(8) Possession of a knife, etc., as defined in § 39-17-1301 on school property;

(9) Assaulting a principal or teacher with vulgar, obscene or threatening language;

(10) Unlawful use or possession of barbital or legend drugs, as defined in § 53-10-101;

(11) Any other conduct prejudicial to good order or discipline in any public school; and

(12) Off-campus criminal behavior which results in the student being legally charged with a felony and the student's continued presence in school poses a danger to persons or property or disrupts the educational process.

(b)(1) Any principal, principal-teacher or assistant principal may suspend any pupil from attendance at a specific class, classes or school-sponsored activity without suspending such pupil from attendance at school pursuant to an in-school suspension policy adopted by the local board of education. Good and sufficient reasons for such in-school suspension include, but are not limited to:

(A) Behavior which adversely affects the safety and well-being of other pupils;

(B) Behavior which disrupts a class or school sponsored activity; or

(C) Behavior prejudicial to good order and discipline occurring in class, during school-sponsored activities or on the school campus.

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(2) In-school suspension policies shall provide that pupils given an in-school suspension in excess of one (1) day from classes shall attend either special classes attended only by students guilty of misconduct or be placed in an isolated area appropriate for study. Students given in-school suspension shall be required to complete academic requirements.

(c)(1) Except in an emergency, no principal, principal-teacher or assistant principal shall suspend any student until that student has been advised of the nature of the student's misconduct, questioned about it, and allowed to give an explanation.

(2) Upon suspension of any student other than for in-school suspension of one (1) day or less, the principal shall, within twenty-four (24) hours, notify the parent or guardian and the superintendent or the superintendent's designee of:

(A) The suspension, which shall be for a period of no more than ten (10) days;

(B) The cause for the suspension; and

(C) The conditions for readmission, which may include, at the request of either party, a meeting of the parent or guardian, student and principal.

(3) If the suspension is for more than five (5) days, the principal shall develop and implement a plan for improving

the behavior which shall be made available for review by the superintendent upon request.

(4)(A) If, at the time of the suspension, the principal, principal-teacher or assistant principal determines that an offense has been committed which would justify a suspension for more than ten (10) days, such person may suspend a student unconditionally for a specified period of time or upon such terms and conditions as are deemed reasonable.

(B) The principal, principal-teacher or assistant principal shall immediately give written or actual notice to the parent or guardian and the student of the right to appeal the decision to suspend for more than ten (10) days. All appeals must be filed, orally or in writing, within five (5) days after receipt of the notice and may be filed by the parent or guardian, the student or any person holding a teaching license who is employed by the school system if requested by the student.

(C) The appeal from this decision shall be to the board of education or to a disciplinary hearing authority appointed by the board. The disciplinary hearing authority, if appointed, shall consist of at least one (1) licensed employee of the local education agency, but no more than the number of members of the local board.

(D) The hearing shall be held no later than ten (10) days after the beginning of the suspension. The local board of education or the disciplinary hearing authority shall give written notice of the time and place of the hearing to the parent or guardian, the student and the school official designated above who ordered the suspension. Notice shall also be given to the local education agency employee referenced in subdivision (c)(4)(B) who requests a hearing on behalf of a suspended student.

(5) After the hearing, the board of education or the disciplinary hearing authority may affirm the decision of the principal, order removal of the suspension unconditionally or upon such terms and conditions as it deems reasonable, assign the student to an alternative program, or night school, or suspend the student for a specified period of time.

(6) If the decision is determined by a disciplinary hearing authority, a written record of the proceedings, including a summary of the facts and the reasons supporting the decision, shall be made by the disciplinary hearing authority. The student, principal, principal-teacher or assistant principal may within five (5) days of the decision request review by the board of education; provided, that local school board policy may require an appeal to the superintendent prior to a request for review to the board. Absent a timely appeal, the decision shall be final. The board of education, based upon a review of the record, may grant or deny a request for a board hearing and may affirm or

overturn the decision of the hearing authority with or without a hearing before the board; provided, that the board may not impose a more severe penalty than that imposed by the hearing authority without first providing an opportunity for a hearing before the board. The action of the board of education shall be final.

(d) In the event the suspension occurs during the last ten (10) days of any term or semester, the pupil may be permitted to take such final examinations or submit such required work as is necessary to complete the course of instruction for that semester, subject to the action of the principal, or the final action of the board of education upon any appeal from an order of a principal continuing a suspension.

(e) Students under in-school suspension shall be recorded as constituting a part of the public school attendance in the same manner as students who attend regular classes.

(f) Nothing in this title shall require a local education agency to enroll a student who is under suspension and/or expelled in a local education agency either in Tennessee or another state. The superintendent for the school system in which the suspended student requests enrollment shall make a recommendation to the local board of education to approve or deny the request. Such recommendation shall occur only after investigation of the facts surrounding the suspension from the former school system. If the recommendation is to deny admission, and if the local board approves the superintendent's recommendation, the superintendent shall,

on behalf of the board of education, notify the commissioner of the decision. Nothing in this subsection shall affect children in state custody or their enrollment in any local education agency. Any local education agency which accepts enrollment of a student from another local education agency may dismiss such student if it is determined subsequent to enrollment that the student had been suspended or expelled by the other local education agency.

(g) Notwithstanding the foregoing or any other law to the contrary, a pupil determined to have brought to school or to be in unauthorized possession on school property of a firearm, as defined in 18 U.S.C. § 921, shall be expelled for a period of not less than one (1) year, except that the director or superintendent may modify this expulsion on a case-by-case basis. For purposes of this subsection, "expelled" means removed from the pupil's regular school program at the location where the violation occurred or removed from school attendance altogether, as determined by the school official. [Acts 1925, ch. 115, § 8; Shan. Supp., § 1487a52; Code 1932, § 2341; Acts 1959, ch. 94, § 1; 1970, ch. 344, § 1; 1970, ch. 580, § 1; 1974, ch. 654, § 69; 1981, ch. 117, §§ 1-7; 1982, ch. 608, §§ 1, 2; T.C.A. (orig. ed.), § 49-1309; Acts 1986, ch. 671, § 1; 1988, ch. 646, § 1; 1991, ch. 382, §§ 1, 2; 1991, ch. 411, § 1; 1992, ch. 949, § 1; 1993, ch. 383, § 1; 1995, ch. 268, § 1; 1995, ch. 365, § 1; 1998, ch. 830, § 1.]

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Tenn. Code § 49-6-4011

49-6-4011. Short title. — This part shall be known and may be cited as the "Student and Employee Safe Environment Act of 1996." [Acts 1996, ch. 988, § 2.]

Tenn. Code § 49-6-4012

49-6-4012. Formulation and administration of behavior and discipline codes. — (a) The governing body of each local education agency shall be responsible for formulating a code of acceptable behavior and discipline to apply to the students in each school operated by such local education agency.

(b) The superintendent or other administrative head of the local education agency shall be responsible for overall implementation and supervision, and each school principal shall be responsible for administration and implementation within that school.

(c) The governing body of each local education agency shall review and, if necessary, redraft existing behavior and discipline codes prior to January 1, 1997. In formulating the behavior and discipline codes, the governing body of each local education agency shall seek recommendations from parents, employees, law enforcement personnel, and youth-related agencies in the community. [Acts 1996, ch. 988, § 3.]

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Tenn. Code § 49-6-4013

49-6-4013. Code contents. — Each code shall contain the type of behavior expected from each student, the consequences of failure to obey such standards, and the importance of the standards to the maintenance of a safe learning environment where orderly learning is possible and encouraged. Each code shall address the topics of language used by students, respect for all school employees, fighting, threats, weapons on school property or at school functions, damage to the property or person of others, misuse or destruction of school property, drug or alcohol abuse, the sale or distribution of drugs or alcohol, student conduct on school property, conduct in classes, and such other subjects as the local governing body shall choose to include. [Acts 1996, ch. 988, § 4.]

Tenn. Code § 49-6-4014

49-6-4014. Uniform and fair application of codes. — The principal of each school shall apply the code uniformly and fairly to each student at the school without partiality or discrimination. [Acts 1996, ch. 988, § 5.]

Tenn. Code § 49-6-4015

49-6-4015. Different codes for different classes of schools. — The governing body of the local education agency may choose to adopt different but consistent codes of behavior and discipline to apply to different classes of schools, such as elementary, middle, junior high, and senior high, under its jurisdiction. All such codes shall be uniform

to the extent of maximum consideration for the safety and well-being of students and employees. [Acts 1996, ch. 988, § 6.]

Tenn. Code § 49-6-4016

49-6-4016. Civil liability. — In addition to criminal penalties provided by law, there is created a civil cause of action for an intentional assault, personal injury or injury to the personal property of students or school employees when such assault occurs during school hours, on school property or during school functions, including travel to and from school on school buses. A person who commits such an assault or injury shall be liable to the victim for all damages resulting therefrom, including compensatory and punitive damages. Upon prevailing, the victim shall be entitled to treble damages and reasonable attorney fees and costs. [Acts 1996, ch. 988, § 7.]

Tenn. Code § 49-6-4017

49-6-4017. Code distribution and posting. — When a code of behavior and discipline has been adopted by the governing body of a local education agency, a copy of the code shall be posted at each school, and guidance counselors shall be supplied copies for discussion with students. The code shall be referenced in all school handbooks. All teachers, administrative staff and parents shall be provided copies of the code. [Acts 1996, ch. 988, § 8.]

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Tenn. Code § 49-6-4018

49-6-4018. Student actions resulting in expulsion. — In addition to the other provisions of this part, a student committing battery upon any teacher, principal, administrator or any other employee of a local education agency or unlawfully possessing any narcotic or stimulant drug, prescription drug, or any other controlled substance shall be expelled for a period of not less than one (1) calendar year, except that the director or superintendent may modify this expulsion on a case-by-case basis. For purposes of this section, "expelled" means removed from the pupil's regular school or removed from school attendance altogether, as determined by the school official. Nothing in this section shall be construed to prohibit the assignment of such students to an alternative school. [Acts 1996, ch. 988, § 11; 1997, ch. 326, § 1.]

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PART 42 — SCHOOL SECURITY ACT

Tenn. Code § 49-6-4201

49-6-4201. Short title. — This part shall be known and may be cited as the "School Security Act of 1981." [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-401.]

Tenn. Code § 49-6-4202

49-6-4202. Definitions. — As used in this part, unless the context otherwise requires:

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(1) "Dangerous weapon" or "weapon" means any dangerous instrument or substance, which is capable of inflicting any injury on any person;

(2) "Drug" means any controlled substance, marijuana, alcohol, legend drug or any other substance whose possession or use is regulated in any manner by any governmental authority, including the school system;

(3) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a drug, as defined in subdivision (2). An electronic pager in the possession of a student shall be included in this definition if used or intended for use as defined by this subdivision;

(4) "School" means all public schools which conduct classes in any grade from kindergarten through grade twelve (K-12);

(5) "School Principal" or "principal" means the administrative head of a public school, by whatever title such person may be known;

(6) "Student" means any person, regardless of age, enrolled in the public school; and

(7) "Visitor" means any person who is on school property, except for certificated personnel employed by the state or local board of education. [Acts 1981, ch. 368, § 2; 1983, ch. 397, § 1; T.C.A., § 49-9-402; Acts 1988, ch. 727, § 1; 1994, ch. 636, § 13.]

Cross-References. Carrying weapons on school property, § 39-17-1309.

Tenn. Code § 49-6-4203

49-6-4203. Legislative intent. — (a) It is the intent of the general assembly in enacting this part to secure a safe environment in which the education of the students of Tennessee may occur.

(b) The general assembly recognizes the position of the schools in loco parentis and the responsibility this places on principals and teachers within each school to secure order and to protect students from harm while in their custody.

(c) It is the intent of this part to extend further, rather than limit, the authority of principals and teachers to secure order and provide protection of students within each school.

(d) The general assembly further recognizes that a rising level of violent activity and use of drugs is occurring in some public schools, especially in urban areas, and that these activities threaten the well-being of all students in such schools.

(e) The general assembly further finds that:

(1) The removal of dangerous weapons, drug paraphernalia and drugs from school property is necessary to lessen hazards to students and that such removal can only be accomplished by searches of areas of the school buildings or grounds where such materials may be stored;

(2) On occasions when the use of dangerous weapons or drugs has reached a life or health threatening level, searches of students themselves may be necessary to protect the larger student body, and that often such searches must be conducted in emergency situations;

(3) Individual circumstances and local particularities require that individual principals must be relied on to exercise their professionally trained judgments in determining what action is appropriate within the provisions of this part; and

(4) The presence on school property of students with drugs in their bodies may pose a threat to the safety and well-being of that student and other students, may be disruptive of school classes and other programs, and may interfere with the educational opportunities and progress of all students. [Acts 1981, ch. 368, § 2; 1983, ch. 397, § 2; T.C.A., § 49-9-403; Acts 1988, ch. 727, § 2; 1988, ch. 940, § 2.]

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Tenn. Code § 49-6-4204

49-6-4204. Search of lockers. — (a) When individual circumstances in a school dictate it, a principal may order that vehicles parked on school property by students or visitors, containers, packages, lockers or other enclosures used for storage by students or visitors, and other areas accessible to students or visitors be searched in the principal's presence or in the presence of other members of the principal's staff.

(b) Individual circumstances requiring a search may include incidents on school property, including school buses, involving, but not limited to, the use of dangerous weapons, drugs or drug paraphernalia by students, which are known to the principal or other staff members, information received from law enforcement, juvenile or other authorities indicating a pattern of drug dealing or drug use by students of that school, any assault or attempted assault on school property with dangerous weapons, or any other actions or incidents known by the principal which give rise to reasonable suspicion that dangerous weapons, drugs or drug paraphernalia are held on school property by one (1) or more students.

(c) A notice shall be posted in the school that lockers and other storage areas, containers, and packages brought into the school by students or visitors are subject to search for drugs, drug paraphernalia, dangerous weapons or any property which is not properly in the possession of the student.

(d) A notice shall be posted where it is visible from the school parking lot that vehicles parked on school property by students or visitors are subject to search for drugs, drug paraphernalia or dangerous weapons. [Acts 1981, ch. 368, § 2; 1983, ch. 397, §§ 3, 4; T.C.A., § 49-9-404; Acts 1988, ch. 727, §§ 3-5; 1994, ch. 636, §§ 1-4.]

Tenn. Code § 49-6-4205

49-6-4205. Search of persons and containers. — (a) A student may be subject to physical search because of the results of a locker search, or because of information received from a teacher, staff member, student or other person if such action is reasonable to the principal.

(b) All of the following standards of reasonableness shall be met:

(1) A particular student has violated school policy;

(2) The search will yield evidence of the violation of school policy or will lead to disclosure of a dangerous weapon, drug paraphernalia or drug;

(3) The search is in pursuit of legitimate interests of the school in maintaining order, discipline, safety, supervision and education of students;

(4) The search is not conducted for the sole purpose of discovering evidence to be used in a criminal prosecution; and

(5) The search shall be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student, as well as the nature of the infraction alleged to have been committed. [Acts 1981, ch. 368, § 2; 1983, ch. 397, § 6; T.C.A., § 49-9-406; Acts 1988, ch. 727, § 6; 1994, ch. 636, §§ 5, 6.]

Tenn. Code § 49-6-4206

49-6-4206. [Repealed.]

Tenn. Code § 49-6-4207

49-6-4207. Use of metal detectors. — To facilitate a search which is found to be necessary of students, school visitors, containers or packages, metal detectors and other devices designed to indicate the presence of dangerous weapons, drug paraphernalia or drugs may be used in searches, including hand-held models which are passed over or around a student's or visitor's body, and students, visitors, containers and packages may be required to pass through a stationary detector. [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-408; Acts 1988, ch. 727, § 8; 1994, ch. 636, §§ 8, 9.]

Tenn. Code § 49-6-4208

49-6-4208. Use of animals. — To facilitate a search which is found to be necessary, dogs or other animals trained to detect drugs or dangerous weapons by odor or otherwise may be used in conducting searches, but such animals shall be used only to pinpoint areas needed to be searched and

shall not be used to search the persons of students or visitors. [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-409; Acts 1994, ch. 636, §§ 10, 11.]

Tenn. Code § 49-6-4209

49-6-4209. Report of reasonable suspicion by principal to law enforcement officer. — It is the duty of a school principal who has reasonable suspicion to believe, either as a result of a search or otherwise, that any student is committing or has committed any violation of § 39-17-1307, § 39-17-1309, or of title 39, chapter 17, part 4, upon the school ground or within any school building or structure under the principal's supervision, to report such reasonable suspicion to the appropriate law enforcement officer. School personnel have the duty to report any reasonable suspicion that a student is committing or has committed any violation of § 39-17-1307 to the principal, or, if the principal is not available, to the principal's designee. If neither the principal nor the designee is available, school personnel may report such violations of § 39-17-1307 committed on school property to the appropriate authorities. [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-410; Acts 1994, ch. 636, § 12; 1995, ch. 102, § 1; 1995, ch. 215, § 1.]

Tenn. Code § 49-6-4210

49-6-4210. Disposal of contraband. — Any dangerous weapon or drug located by the principal or other staff member in the course of a search shall be turned over to the appropriate law enforcement officer for proper disposal. [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-411.]

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Tenn. Code § 49-6-4211

49-6-4211. Defense of school personnel by education agency — Indemnity. — (a) The local education agency shall defend principals and teachers against whom suit is brought on account of any action taken in accordance with this part it:

(1) Such employees cooperate in the defense of such suit; and

(2) In the opinion of the local education agency, such actions were not the result of willful, wanton or malicious wrongdoing.

(b) Each local education agency shall indemnify principals and teachers from judgment against them if:

(1) Such judgments result from actions or omissions arising out of performance of the duties imposed by this part and do not result from willful, wanton or malicious wrongdoing; and

(2) Such employees have cooperated with the local education agency in the defense of such suit.

(c) The provisions of this section shall not be construed to indicate any waiver by the state of sovereign immunity or to make the state any insurer of the aforementioned public officials. [Acts 1981, ch. 368, § 2; T.C.A., § 49-9-412.]

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Tenn. Code § 49-6-4212

49-6-4212. Training program for school principals — Notice of policies to parents and students. — (a) The local education agency and the local law enforcement agency shall establish and maintain an orientation and training program designed to familiarize school principals with the provisions of this part and with local policies and procedures for implementing and enforcing this part.

(b) The local education agency shall provide parents and students with reasonable notice of such local policies and procedures. [Acts 1982, ch. 794, § 1; T.C.A., § 49-9-413.]

Tenn. Code § 49-6-4213

49-6-4213. Testing of students for drugs — Referral information — Student assistance program. — (a) A student may be subject to testing for the presence of drugs in the student's body in accordance with this section and the policy of the local education agency if there are reasonable indications to the principal that such student may have used or be under the influence of drugs. The need for such testing may be brought to the attention of the principal through a search authorized by § 49-6-4204 or § 49-6-4205, observed or reported use of drugs by the student on school property, or other reasonable information received from a teacher, staff member or other student. All of the following standards of reasonableness shall be met:

(1) A particular student has violated school policy;

(2) The test will yield evidence of the violation of school policy or will establish that a student either was impaired due to drug use or did not use drugs;

(3) The test is in pursuit of legitimate interests of the school in maintaining order, discipline, safety, supervision and education of students;

(4) The test is not conducted for the sole purpose of discovering evidence to be used in a criminal prosecution; and

(5) Tests shall be conducted in the presence of a witness. Persons who shall act as witnesses shall be designated in the policy of the local board of education.

(b) For the purposes of this section and § 49-6-4203, "drugs" means:

(1) Any scheduled drug as specified in §§ 39-17-405 — 39-17-416; and

(2) Alcohol.

(c) Before a drug testing program is implemented in any local education agency, the local board of education in that local education agency shall establish policies, procedures and guidelines to implement the provisions of this section within that local education agency. The state board of education shall prepare a model policy, procedure

and guidelines which may be adopted by local boards of education.

(d) Tests shall be conducted by properly trained persons in circumstances that ensure the integrity, validity, and accuracy of the test results but are minimally intrusive and provide maximum privacy to the tested student. All tests shall be performed by an accredited laboratory. Specimens confirmed as positive shall be retained for possible retesting or reanalysis for at least ten (10) days.

(e) Students shall be advised in writing at the time of their enrollment that they are subject to testing. Notice to each student shall include grounds for testing, the procedures that will be followed, and possible penalties. Students shall be advised of their right to refuse to undergo drug testing and the consequences of such refusal.

(f) A parent of the student or a person legally responsible for the student shall be notified before any drug test is administered to the student.

(g) The local education agency shall pay the cost of any testing required under the provisions of this section.

(h) In any school where local education agency or school policy allows tests provided for by this section, in-service training of principals and teachers will be conducted in signs and symptoms of student drug use and abuse and in the school policy for handling of these students. The department of mental health and mental retardation shall cause qualified trainers to be available to such schools to conduct this training.

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(i) Test reports from laboratories shall include the specimen number assigned by the submitting local education agency, the drug testing laboratory accession number and results of the drug tests. Certified copies of all analytical results shall be available from the laboratory when requested by the local education agency or the parents of the student. The laboratory shall not be permitted to provide testing results verbally by telephone.

(j)(1) All specimens testing negative on the initial screening test or negative on the confirmatory test shall be reported as negative. When a student is tested and the results of the test are negative, all records of the test, the request for the test, and indications that a student was identified for testing and was tested, shall be expunged from all records in the school system.

(2) If a student is tested and the results of the test are negative, all records of the test, request for a test, or indication a student has been tested, shall be expunged from all records.

(k) The principal, or guidance counselor, of the school in which a student who tests positive in a drug testing program is enrolled shall provide referral information to such student and to such student's parents or guardian. Such information shall include information on inpatient, outpatient and community-based drug and alcohol treatment programs.

(*l*) The department shall cause a student assistance program to be provided in schools authorizing drug testing

of students under subsection (a). At a minimum, this student assistance program shall consist of a qualified student assistance program coordinator who may serve one (1) or more schools where drug testing is allowed. This coordinator shall conduct assessment counseling with any student who tests positive for the presence of drugs or alcohol. Such counseling shall include a determination of the severity of the student's alcohol and drug problem and recommendation for referral to intervention or treatment resources as appropriate. The expansion of these services by the department into additional schools after the initial year shall be subject to availability of funds.

(m) Malicious use of authority granted by the provisions of this section may be grounds for dismissal of the person so acting. [Acts 1988, ch. 940, § 1.]

Tenn. Code § 49-6-4124

49-6-4214. Possession of pagers by students. — Possession of an electronic pager by a student on school property, without the permission of the school principal or the principal's designated representative, is prima facie evidence of its intended use in violation of this part. [Acts 1989, ch. 141, § 1.]

Tenn. Code § 49-6-4215

49-6-4215. Wearing clothing denoting gang membership or affiliation. — The local and county boards of education of this state are hereby authorized to promulgate and adopt rules and regulations to prohibit

students in grades six (6) through twelve (12) from wearing, while on school property, any type of clothing, apparel or accessory, including that which denotes such students' membership in or affiliation with any gang associated with criminal activities. The local law enforcement agency shall advise the local board, upon request, of gangs which are associated with criminal activities. [Acts 1994, ch. 571, § 1.]

Tenn. Code § 49-6-4216

49-6-4216. School policies and procedures — Contents — Notice to students and parents. — (a) Prior to commencement of fall classes for the 1996-1997 school year, and annually thereafter, each local and county board of education shall file with the commissioner of education written policies and procedures developed and adopted by the board:

(1) To ensure safe and secure learning environments free of drugs, drug paraphernalia, violence and dangerous weapons; and

(2) To impose swift, certain and severe disciplinary sanctions on any student:

(A) Who brings a drug, drug paraphernalia or a dangerous weapon onto a school bus, onto school property or to any school event or activity; or

(B) Who, while on a school bus, on school property or while attending any school event or activity:

(i) Is under the influence of a drug; or

(ii) Possesses a drug, drug paraphernalia or dangerous weapon; or

(iii) Assaults or threatens to assault a teacher, student or other person.

(b) Each local and county board of education is encouraged to include within such policies and procedures a zero tolerance policy toward any student who engages in such misconduct. Such policies and procedures shall ensure that such misconduct is promptly reported to appropriate law enforcement authorities and may also provide for deployment of law enforcement officers and/or school safety and security personnel, use of dogs trained to detect marijuana and other drugs, conflict prevention and resolution programs and activities for staff and students, utilization of metal detectors, and/or adoption of uniform clothing styles for students.

(c) At the beginning of fall classes each school year, each local and county board of education shall provide students and their parents with written notification of such policies and procedures. Additionally, each school shall conspicuously post a summary of such policies and procedures within each school. [Acts 1996, ch. 888, § 1.]

Appendix B

PART 43 — REPORTING STUDENT OFFENSES

Tenn. Code § 49-6-4301

49-6-4301. School officials to report student offenses. — (a) Every teacher observing or otherwise having knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property shall report such action immediately to the principal of such school. Every principal having direct knowledge of an assault and battery or vandalism endangering life, health or safety committed by a student on school property or receiving a report of such action shall report such action immediately to the municipal or metropolitan police department or sheriff's department having jurisdiction. Any fight not involving the use of a weapon as defined in § 39-17-1309, or any fight not resulting in serious personal injury to the parties involved, shall be reported only to the school administrator.

(b) The report made to the law enforcement agency shall include, if known, the name and address of the offender, and the name and address of the victim, if any. The report shall also contain a description of the action and whatever additional information is requested by the law enforcement agency. [Acts 1981, ch. 341, § 1; T.C.A., § 49-1320.]

Tenn. Code § 49-6-4302

49-6-4302. Tennessee school safety center. — (a) The department of education shall establish a Tennessee school safety center to develop and evaluate training

materials and guidelines on school safety issues, including behavior, discipline and violence prevention.

(b) The Tennessee school safety center shall be responsible for the collection and analysis of data related to school safety including alleged violent or assaultive acts against school employees and students. Analysis of data shall include the number of arrests, the charges and whether civil damages were pursued by the injured party or school system. The center shall make periodic reports to the select oversight committee on education on the status of school safety efforts.

(c)(1) The Tennessee school safety center, within the limit of appropriations for such, may establish grants to local education agencies for the development of innovative violence prevention programs, conflict resolution, disruptive or assaultive behavior management, improved school security, peer mediation, and training for employees on the identification of possible perpetrators of school related violence.

(2) The grants provided for in subdivision (c)(1) shall be distributed as follows:

> (A) Funding would be available to each local education agency in the same percentage that the local education agency's share of BEP funding bears to statewide BEP funding.
>
> (B) Funding would be subject to a twenty-five percent (25%) match by the local education

agency, adjusted for the local education agency's fiscal capacity under the BEP formula. The match requirement could be satisfied by local or contributed funds or by personnel or other in-kind expenses assumed by the local education agency.

(C) State funding would also be subject to submission by the local education agency to the school safety center of a proposed plan of expenditures to accomplish one (1) or more of the provisions specified in subdivision (c)(1), and approval of that plan by the center. The center should not unreasonably withhold funding, but should allow local education agencies adequate flexibility to experiment so long as the basic requirements of this section are satisfied.

(D) Any funds appropriated for this program in any fiscal year and not expended shall be carried forward for such purposes in future fiscal years. Any allocation for a local education agency which is not applied for or is not successfully applied for in any fiscal year shall not be carried forward for the benefit of that local education agency in subsequent fiscal years, but shall be carried forward for future expenditures under this program in future fiscal years. [Acts 1996, ch. 814, § 1; 1998, ch. 912, §§ 2, 3.]

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KNOX COUNTY EDUCATION ASSOCIATION,
Petitioner,

v.

KNOX COUNTY BOARD OF EDUCATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

INTRODUCTION

In a series of cases from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), through *Chandler v. Miller*, 520 U.S. 305 (1997), this Court has made it clear that the Fourth Amendment does not permit government to engage in suspicionless drug testing of employees or other citizens absent a showing that such testing is necessary to address "real and not simply hypothetical" dangers. *Chandler*, 520 U.S. at 319. *See* Petition for a Writ of Certiorari ("Petition") at 10-15. The Sixth Circuit ignored that rule in this case. Relying on what that court described as "common sense," "experience of life," and "intuitive[] understanding[ing]" of how public schools operate, App. 37a-38a and n.23, rather than on record evidence, the court approved suspicionless testing

of applicants for public school teaching positions on the basis of "speculation, and not very plausible speculation at that." *Treasury Employees v. Von Raab*, 489 U.S. 656, 682 (1989) (Scalia, J., dissenting). *See* Petition at 17-19.

Respondent Knox County Board of Education ("Board") contends that we have mischaracterized the decision below, *see* Brief in Opposition ("Opp.") at 1, and the Board labors for eleven pages to describe what it asserts is record evidence supporting the conclusion that suspicionless drug testing of Knox County's teacher candidates is necessary to protect the safety of students. Opp. 1-11. The Board also contends that there are provisions in the Code of Tennessee which place responsibilities on public school teachers that make them tantamount to security officers. *Id.* at 14-19. As we show *infra* at 3-7, however, the evidence the Board cites regarding the supposed safety need for suspicionless drug testing of teacher candidates is so gossamer, and the statutory provisions on which the Board relies are of such little relevance, that one can readily appreciate why the Sixth Circuit found it necessary to resort to "common sense," "experience of life" and "intuitive[] understanding[ing]," rather than to record evidence, in search of support for the testing program. Indeed, the fact that the Board, in the course of its efforts to demonstrate an ostensible safety purpose for the challenged testing, devotes much ink to the concept of teachers as "role models," to the importance of effective teaching, and to other non-safety considerations is a giveaway that the testing policy is not in fact directed at any real safety need. *See infra* at 7-9.

Accordingly, as we asserted in our Petition, and as we elaborate *infra* at 9-10, this case presents an important question as to the type of evidentiary showing that must

be made by a public employer in order to justify suspicionless drug testing of employees. Furthermore, because the court below adopted (and the Brief in Opposition endorses) the position that the challenged testing is justified merely by the fact that teachers have general responsibility to supervise and protect students—a fact that is true, as far as it goes, of *all* public school teachers —this case also presents a more particularized question, likewise of great significance: whether teacher applicants, and in-service teachers as well, in *all* public school systems, can routinely be subjected to suspicionless drug testing without any showing that the duties they actually are called upon to perform are of such a nature as to warrant such an intrusion.

ARGUMENT

1. Like the court below, *see* Petition at 15-16, in attempting to construct a safety rationale for suspicionless drug testing of teacher applicants the Board emphasizes the role teachers may play in reporting student misconduct. *See* Opp. 4, 17, 18. Although, as we note in the margin, that account significantly exaggerates both the record evidence regarding the extent to which Knox County teachers function as ersatz security officers, and the reporting responsibilities placed upon them by Tennessee law,[1] there is a more pertinent point for present

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[1] Only a small fraction of the incidents that are reported to the Knox County Schools Security Department involving violent conduct, possession of weapons or drugs, or other student behavior are reported by teachers. *See* Exhibit 2A, JA 1122-1140; *see also* JA 936-37. The vast majority of such incidents are reported by students, other school personnel, or security officers. *See* Exhibit 2B, JA 1141-1308.

In depicting the Code of Tennessee as imposing on teachers wide-ranging duties to monitor and report dangerous student behavior, Opp. 14-18, 23, the Board seriously distorts the statutory provisions.

[Footnote Continued]

purposes. Whatever may be the nature and scope of teachers' responsibilities with respect to reporting student misconduct, *there simply is no evidence, nor does the Board purport to cite any, to suggest that suspicionless drug testing is necessary to ensure that teachers will properly carry out those responsibilities. See* Petition at 5, 16, 19.

As for teachers' other purported safety duties, the evidence cited by the Board consists of descriptions by two

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[1] [Footnote Continued]

For example, the Board claims to find in Code § 49-6-4205(a) an "acknowledg[ement]" by the Tennessee General Assembly "that teachers are the first observers of student misconduct," Opp. 17, because that statutory provision provides (in the Board's cropped quotation) that a student may be searched as a result of "information received from a teacher." What the provision actually states, however, is that a student may be searched "because of information received from a teacher, *staff member, student* or *other person*." The provision thus does not "acknowledge" any special role of teachers.

Only two provisions of the Code place any obligations on teachers to report student misconduct, and they are very narrow: § 49-6-4301(a) requires teachers to report "assault and battery or vandalism endangering life, health or safety committed by a student on school property," and § 49-6-4209 requires *all* "school personnel" to report violations by students of Tennesse's weapon-possession law. Significantly, the Tennessee School Security Act, upon which the Board places great emphasis, *see* Opp. 15-17, provides that *school principals* are to receive "orientation and training . . . designed to familiarize [them] with the provisions of [the Act] and with local policies and procedures for implementing [the Act]," § 49-6-4212, but the statute does not require any such orientation or training for teachers.

The Board also is wrong in declaring that teachers are under a special "statutory responsibility to report student drug . . . offenses." Opp. 18. The responsibility to deal with student drug use rests with the *principal*, who may act, *inter alia*, on information received from a "teacher, *staff member* or *other student*." § 49-6-4213 (emphasis added). *Cf. Vernonia School District 47J v. Acton*, 515 U.S. 656, 664 (1995) (noting that teachers are "ill prepared" for "the . . . function of spotting and bringing to account [student] drug abuse, a task . . . which is not readily compatible with their vocation").

administrators of a teacher's "typical day," and testimony regarding an extraordinary act of heroism by one teacher. *See* Opp. 4-8.[2] The "typical day" scenario described by Betty Sparks, *see* Opp. 4-5, includes such activities as "helping to open milk cartons," "trying to interact with the youngsters . . . so they'll feel good about that specific day," "stopping to talk with a parent about a concern a parent might have," "getting all th[e] reading groups going," "giving positive reinforcements," and the like. JA 872-77. Although this testimony indicates that a teacher's job is "hectic," Opp. 5, it falls far short of establishing a safety need for suspicionless drug testing. The "typical day" testimony of Henrietta Grant likewise is devoid of any demonstration of a safety need for such testing. *See* JA 951-53.[3] The Board enters the realm of

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[2] The Board also cites the testimony of the Chief of Security that teachers are "most definitely" important to security, Opp. 4, but that testimony refers only to the subject of reporting student misconduct. *See* JA 937, 943.

[3] The tenor of Ms. Grant's testimony is well illustrated by the following exchange, which the Board, in a flight of fancy, characterizes as "[u]nderlining the importance of teacher alertness" (Opp. 5):

Q: Describe for the Court, if you will, what the hallways in Austin-East are like when the seven hundred and sixty-three students are changing classes.

A: [Ms. Grant] Mad house. They're typical teenagers; it's the time to court, have a good time, talk to your friends. And do things that [are] necessary, like going to the bathroom and that kind of thing. We have one period of the day that's longer between classes than the other time is, so it's just a good time for the kids to socialize.

Q: Are there teachers in the hallways when the students are changing classes?

A: Yes.

Q: And what are the teachers supposed to be doing?

[Footnote Continued]

fantasy when it treats such testimony as comparable to the evidence regarding the duties of railroad employees—and the documented role of employee drug and alcohol abuse in causing train wrecks—in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). *See* Opp. 18, 20.

The one instance the Board is able to cite in which a teacher actually did take an action directly affecting student safety and requiring extraordinary alertness—an incident several years ago where a teacher grabbed a knife-wielding student who was in the act of stabbing another student, Opp. 7—is significant precisely because of its atypicality. Although the image of a teacher heroically rescuing a student may be a powerful one, there is no evidence that Knox County's teachers are expected to intervene in knife fights—much less that they are trained, or required to maintain the physical fitness necessary to enable them, effectively to do so. The Board's reference to this incident, and to recent tragic shootings at schools in other parts of the country, *see* Opp. 14-15 n.9, misses the mark. To be sure, violence in the schools is a real problem; and for that reason it requires real solutions. To suggest, however, that suspicionless drug testing of teacher candidates is a meaning-

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3 [Footnote Continued]

A: They serve as monitors. They stand outside the doors when classes are changing. We have some assigned to just kind of walk around and see what's going on.

* * * *

Q: And do you have teachers that are present in the cafeteria when the students are eating?

A: Yes. We have teachers who eat in the cafeteria and we have other teachers who are present there, yes.

Q: And what are their duties and responsibilities while they are there? The teachers' duties and responsibilities?

A: They kind of monitor things. [JA 948-50]

ful way to combat violence by students is fatuous—particularly where, as here, there is no evidence that school authorities have taken any other steps to ensure that teachers will function effectively in their supposed role as security officers.

Contrary to the Board's assertion, it is not our position that there must be "a statistical nexus between student injuries and drug impaired teachers" before a suspicionless drug testing policy can be adopted. Opp. 21. By the same token, however, it is not enough simply to establish that students confront safety hazards, Opp. 3, 16, 23, and that teachers have a general responsibility to protect students, Opp. 15, 18-19, 23.[4] Under this Court's precedents, what is required at the least is a showing not only that an employee has some safety-related responsibilities, but that those responsibilities are of such a nature that without drug testing—more precisely, without *suspicionless* testing—substantial harm is likely to occur. *See* Petition at 10-15. There is not the slightest evidence in this record to support such a conclusion. *Id.* at 4-6, 15-19.

2. That the Board's suspicionless drug testing program is not a means of protecting student safety, but rather an exercise in symbolism, is laid bare by the Board's repeated assertions that teachers should be subject to such testing because they are "role models." *See* Opp. 7, 13-14, 18-19. This confirms the perception of the four judges who dissented from the denial of rehearing en banc that the testing program, and the decision below sustaining that program, "can only be justified as a political statement

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[4] Nor is it of consequence that teachers do not have an expectation of continued employment if they use unlawful drugs on the job. Opp. 18. "The issue here is not whether [teachers] can constitutionally be . . . dismissed [for drug use] . . . . The issue here is what steps can constitutionally be taken to *detect* such drug use." *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

that drug use by teachers is unacceptable." App. 87a-88a. *Chandler* explicitly rejects such a justification for suspicionless drug testing by government: "a need of the 'set a good example' genre [is not] sufficient to overwhelm a Fourth Amendment objection." 520 U.S. at 322.

The Board also is at pains to declare that "teacher alertness is key not only to student safety but to a positive school experience." Opp. 4. Having shifted ground from "safety-sensitivity" to the furnishing of a "positive school experience," the Board goes on to pepper its Brief in Opposition with references to a "meaningful school experience," *id.*, "doing the best" for "the teaching of children," *id.* at 5, being "competent enough to work with [the students, who are] just smarter than we are," *id.* at 6, and "getting our children educated," *id.* at 7. Petitioner yields to no one in recognizing these as important objectives of public education. But there is no evidence whatsoever that suspicionless drug testing of teacher candidates is necessary or effective for achieving them. The Board's reliance on such considerations is yet another sign that the Board's testing program is born of symbolism rather than of safety-sensitivity.

In sum, the Board has adopted—and the Sixth Circuit has sustained—precisely what this Court proscribed in *Chandler* when it emphasized that to pass constitutional muster, suspicionless drug testing must, at the least, be shown to be an "effective" and "credible means" of addressing a real and urgent need, rather than merely a "symbolic" step. *Chandler*, 520 U.S. at 319-22. *See also Treasury Employees v. Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting) (absent evidence of "a real problem that will be solved by urine testing of . . . employees," such testing is "a kind of immolation of privacy and human dignity in symbolic opposition to drug use").

3. The privacy interests that the Fourth Amendment seeks to protect can survive only if the government is required to justify a search on the basis of demonstrable evidence rather than dubious assumptions. *See Chandler*, 520 U.S. at 319; *Von Raab*, 489 U.S. at 680-87 (Scalia, J., dissenting); *Vernonia*, 515 U.S. at 674-680, 684-86 (O'Connor, J., dissenting). The Sixth Circuit's approval of the Board's suspicionless drug testing program is at odds with this fundamental understanding. That "children are our most important asset," Opp. 7, and that education is of paramount importance, App. 28a-29a, do not, as the Board and the Sixth Circuit appear to believe, justify a failure to require meaningful evidentiary support for a school district's resort to suspicionless testing of teachers or teacher candidates. "As destructive as drugs are and as precious are the charges of our teachers, special needs must rest on demonstrated realities." *United Teachers v. Orleans Parish School Board*, 142 F.3d 853, 857 (5th Cir. 1998).

Under the reasoning of the Sixth Circuit, public school districts across the country would be free to subject teacher applicants—and, indeed, in-service teachers as well—to suspicionless drug testing without any factual showing of a need to do so. *See* Petition at 8-9, 21 n.11. Certiorari should be granted to decide whether such testing is permissible, and also to address the broader question presented by this case as to the type of evidentiary showing that must be made by any agency of government in order to justify suspicionless drug testing of employees.

CONCLUSION

For the reasons stated above and in Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

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